United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

444

No. 17,519

RALPH K. BAXTER, et al.,

Appellants,

v.

JOHN W. MACY, JR., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. SCHLICK
200 World Center Building
Washington 6, D. C.

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STATEMENT OF THE QUESTION PRESENTED

Did the United States Air Force properly interpret its own regulation AFM 40-1 promulgated on August 7, 1957, together with Transmittal Sheet No. 119?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,519

RALPH K. BAXTER, HANFORD H. BRAYALL, DELMAR D. BRISSETTE, WELLMAN L. BROWN, LIONEL J. CARON, AUGUSTIN S. CORMIER, GENE R. CURLESS, THOMAS E. GRIFFIN, HERBERT J. HANLEY, AUSTIN A. HARRIS, HERBERT D. JACKSON, GLENWOOD D. JOHNSTON, EUGENE J. LEGASSEY, SR., PERRY A. MANZER, EUGENE S. MAGILL, BYRON A. McMENANY, PRESTON E. MULLEN, HENRY E. MYSHRALL, VERNON C. NEWCOMB, MAHLON L. NIGHTINGALE, VANCE OLIVER, JOLENE W. PACHECO, WARREN H. ROCKWELL, ALBAN ROY, AVERILL D. SHAW, LESLIE J. SHAW, YALE EDISON SHAW, DONALD A. SMITH, PATRICK O. SOUCY, JAMES E. ST. THOMAS, ERVIN J. SWEENEY, LEONARD W. THOMPSON, BASIL S. TWOMBLY and ORIN F. WILDER,

Appellants,

v.

JOHN W. MACY, JR., CHAIRMAN, Civil Service Commission; FREDERICK J. LAWTON, COMMISSIONER, Civil Service Commission; ROBERT E. HAMPTON, COMMISSIONER, Civil Service Commission, EUGENE M. ZUCKERT, SECRETARY, United States Air Force,

Appellees.

APPFAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a final decision of the United States District Court for the District of Columbia, denying appellants' Motion for Summary Judgment and granting appellees' Cross-Motion for Summary Judgment (J.A. 65). Jurisdiction of the Court is based on the act of June 25,

1948, c. 646, 62 Stat. 929, as amended, U.S.C.A., Title 28, § 1291. Appellants filed a timely Notice of Appeal on November 29, 1962 (J.A. 65).

STATEMENT OF THE CASE

Loring Air Force Base, Limestone, Maine (formerly Limestone Air Force Base), and Presque Isle Air Force Base, Presque Isle, Maine, were established as separate competitive areas for purposes of reduction in force on March 27, 1953 (J.A. 31, Exhibit A).

Each of the facilities was identified and publicized as separate competitive areas from the beginning in March 1953 until the disestablishment of Presque Isle Air Force Base in 1961 (J.A. 5, paragraph 3).

Both facilities were at all times serviced for civilian personnel administration by the Civilian Personnel Office at the Loring Air Force Base (J.A. 51, Exhibit G). The facilities were established as separate competitive areas in 1953 under Air Force regulations (Chapter AF R3-2, Air Force Manual 40-1) which provided:

> "2 (b) All activities which are in the same local commuting area and are serviced by a single central civilian personnel office, which also is located within the same commuting area, will be considered as part of the same competitive area as the servicing installation, unless a serviced activity, which is under a different command jurisdiction than the servicing installation, decides that the best interests of the Air Force require that a separate competitive area be established for that activity." (J.A. 33, Exhibit B)

At that time Presque Isle was under the jurisdiction of the Air Defense Command and Loring was under the Strategic Air Command (J.A. 13, Exhibit 6).

On March 31, 1954 the Air Force regulations pertaining to competitive areas for purposes of reduction in force were amended but still provided for the continued separate competitive areas if each facility was under a different command jurisdiction (J.A. 37, Exhibit C, paragraph 2 (a) (2)). At the time of the amendment each Air Force Base continued to be under a different command jurisdiction.

The applicable regulations pertaining to competitive areas for reduction in force purposes were substantially revised on August 7, 1957 (J.A. 42-44, Exhibit D).

The revised regulations were transmitted with Transmittal Sheet No. 119 (J.A. 45, Exhibit E).

The regulations were again revised on February 25, 1960 but the pertinent sections remained substantially the same as the 1957 regulations (J.A. 47-50, Exhibit F).

In July of 1959 Presque Isle Air Force Base was changed from the Air Defense Command jurisdiction to the Strategic Air Command jurisdiction and thereafter both Bases were under the same command jurisdiction (J.A. 51, Exhibit G, J.A. 10, paragraph 3, Exhibit 1).

After July 1959 both facilities continued to be separate competitive areas for reduction in force purposes until May 1, 1961 (J.A. 5, paragraph 3).

Reductions in force have taken place on the basis of separate competitive areas at one or another of the facilities up to February 1961 (J.A. 13, 1st unnumbered paragraph).

In March of 1961 an announcement was made by the Department of Defense that Presque Isle Air Force Base would be deactivated and declared surplus. On that date a reduction in force became imminent (J.A. 12).

On May 1, 1961 a single competitive area was established "on the basis of a teletype message from Headquarters, U. S. Air Force, Washington, D. C. * * * disapproving a request for continuation of separate competitive areas for the two Bases." (J.A. 53, Exhibit H, J.A. 13, 1st unnumbered paragraph)

During the latter part of May 1961 appellants were notified that they would be separated due to reduction in force as of June 30, 1961.

STATEMENT OF POINT

The Court below erred in failing to grant appellants' Motion for Summary Judgment and granting appellees' Cross-Motion for Summary Judgment.

SUMMARY OF ARGUMENT

Presque Isle Air Force Base and Loring Air Force Base were validly and permanently established as separate competitive areas for the purpose of reduction in force. The U. S. Air Force violated its own regulations when it consolidated the two Bases in a reduction in force in 1961 without meeting the requirements of the regulations.

ARGUMENT

The Air Force, over a period of years, promulgated regulations governing reductions in force which were supplementary to Civil Service regulations.

The Government concedes that the Air Force as an administrative agency is bound by its own regulations, Service v. Dulles, 354 U.S. 363, 1 L. Ed. 2d 1403, and that their own regulations must be rigorously followed, Vitarelli v. Seaton, 359 U.S. 535, 3 L. Ed. 2d 1012. However, it is the Government's position that the issued regulations do not apply to the instant case.

Presque Isle Air Force Base and Loring Air Force Base were validly established as separate competitive areas for purposes of reduction in force from the beginning in 1953. At the time both Bases were serviced by a single central civilian personnel office but each was under a different command jurisdiction.

On August 7, 1957 the regulations were substantially altered. A new basic pattern was established and certain procedural safeguards were added. The important provisions of the regulations are as follows:

"2. COMPETITIVE AREAS

* * *

"(1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located, will constitute one competitive area regardless of command jurisdiction.

"(2) Separate competitive areas will be established for activities in the commuting area which are serviced by different civilian personnel offices, even though the activities may be located at the same site.

"b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters USAF, Washington 25, D. C., and will be accompanied by a complete justification therefor, including the following information:

"(1) Whether the competitive area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with career tenure in the Air Force.

"(2) Extent to which the proposed competitive area has independence of operation and organization, work function, and personnel administration.

"(3) The geographic location of the proposed competitive area in relation to the existing competitive area.

"(4) A statement that a reduction in force is not imminent in the competitive area.

"(5) A list of any serviced activities in the commuting area, designating any which are in a separate competitive area from the servicing activity.

"(6) A certification that both the serviced and servicing activities concerned concur in the proposed arrangement.

"c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of subparagraph 'b' above, later consolidation can be effected only when the following conditions are met.

"(1) Both the serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

"(2) A reduction in force is not imminent in either activity at the time of the consolidation." (Emphasis supplied.)

Thus the two Air Bases would have ceased to be two competitive areas if an exception had not been made by Transmittal Sheet No. 119, which provided:

> "Any administrative plans or systems currently in effect, which were established under former regulations or by approval of this Headquarters, will be resubmitted if it is desired to continue them. An exception is made in the case of competitive areas, which is covered below.
>
> "A basic pattern has been established for competitive areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction, will be in the same competitive area. Where competitive areas have been established under the provisions of the former Chapter AF R3, which do not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices. The record also will include the regulatory or other authority, and date, which permitted establishment of the competitive areas concerned. Activities desiring

> to change from atypical competitive area to the basic pattern established by this regulation will be governed by the provisions of paragraph 2c, section 2, of this chapter." (Emphasis supplied.)

The exception granted by Transmittal Sheet No. 119 had the same effect as if the two Air Bases requested an exception under section 2.b. of the regulations. The provisions of section 2.b. were intended to govern future exceptions to the basic plan. The plans in effect were made a matter of permanent record and the safeguards of section 2.c. were made applicable. To require the request for an exception, as the Government contends, would be to require a useless act.

The Government's position that when the two Air Bases came under the same command jurisdiction in 1959 the exception terminated automatically does violence to the language of the Transmittal Sheet. The regulation in 1957 would have consolidated the two competitive areas if Transmittal Sheet No. 119 had not made the exception. There is nothing in the Transmittal Sheet that says or implies that the exception granted was temporary or would automatically terminate upon the happening of a certain event. On the contrary, the Transmittal Sheet makes it quite clear that the "* * * plan in effect will be made a matter of permanent record * * *."

Regulations enacted by administrative agencies pursuant to delegated power have the force and effect of law. See 42 Am. Jur., Public Administrative Law § 102; Columbia Broadcasting System v. United States, 316 U.S. 407, at 418, 86 L. Ed. 1563, 1571; Standard Oil Company of California v. Charles G. Johnson, 316 U.S. 481, at 484, 86 L. Ed. 1611, 1615; United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, at 265, 98 L. Ed. 681, 686.

The same rules of construction which apply to statutes govern the construction and interpretation of administrative rules and regulations. See Miller v. United States, 294 U.S. 435, at 439, 79 L. Ed. 977, 981; 42 Am. Jur., Public Administrative Law § 101.

The interpretation of regulations presents a question of law where the meaning of the words is clear and there is no ambiguity. See W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U.S. 393, at 397, 81 L. Ed. 301, 304.

The regulations issued by the Air Force are clear. There is no ambiguity in the meaning of the words. The Transmittal Sheet does not change the meaning. Under the regulations the Air Force is prohibited from consolidating the subject Bases into one competitive area unless the two requirements of section 2.c. are met. In the instant case, it is admitted that neither of the requirements were met.

CONCLUSION

It is therefore respectfully submitted that in view of the foregoing, the decision of the United States District Court for the District of Columbia should be reversed, and the case remanded with directions to enter judgment for the appellants.

Respectfully submitted,

JOHN J. SCHLICK

200 World Center Building
Washington 6, D. C.

Attorney for Appellants

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JOINT APPENDIX

[Filed March 5, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH K. BAXTER, et al.,
Plaintiffs,

v.

JOHN W. MACY, JR., et al.
c/o United States Attorney
United States Courthouse
Washington 1, D. C.,
Defendants.

Civil Action No. 727-62

COMPLAINT FOR DECLARATORY JUDGMENT AND MANDATORY ORDER

(1) Plaintiffs are adult residents of the State of Maine and defendants John W. Macy, Jr., Frederick J. Lawton, and Robert W. Hampton are Chairman and Commissioners, respectively, of the United States Civil Service Commission and are sued in their capacity as such. The defendant Eugene M. Zuckert is the Secretary of the Air Force. The matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs.

(2) This is an action for declaratory judgment under 28 U.S.C. Sections 2201 and 2202 for the purpose of determining an actual controversy between the parties. Such controversy involves the proper interpretation and application of Department of the Air Force Regulations AFM 40-1, R3, Section 2 and applicable former regulations.

(3) Plaintiffs were civilian employees of the Department of the Air Force assigned to duty at the Loring Air Force Base, Limestone, Maine.

(4) On or about March 27, 1953, Presque Isle Air Force Base and Loring Air Force Base were established as separate competitive areas for reduction in force purposes under 5 U.S.C. Section 861 and applicable regulations. The said bases were continued as separate competitive areas until May 1, 1961.

(5) The Department of the Air Force on or about March 31, 1954 issued Regulations AFM 40-1, R3.2 in which they set out the regulations for the establishment of competitive areas within the Air Force. These regulations were amended on or about August 7, 1957 and Section 2(c) was added which required that separate competitive areas could be consolidated only when both the serviced and serving activities agreed and a reduction in force was not imminent. The transmittal sheet No. 119, accompanying the amended regulations, provided that where competitive areas had been established under former regulations which did not conform to the new regulations, no change would be required. The said regulations were subsequently amended on or about February 26, 1960 but the applicable section remained substantially the same.

(6) In March 1961 a reduction in force at the Presque Isle Air Force Base became imminent. On May 1, 1961 the Headquarters of the United States Air Force, by telegram, notified the Eighth Air Force at Westover Field Air Force Base, Massachusetts that the Presque Isle Air Force Base and Loring Air Force Base would be considered one competitive area for the purposes of reduction in force. During the latter part of May, plaintiffs were notified by Headquarters, 42nd Bombardment Wing, U. S. Loring Air Force Base, Limestone, Maine that they would be separated from the service due to reduction in force as of June 30, 1961.

(7) Plaintiffs appealed to the First Civil Service Regional Office in Boston, Massachusetts where the said office refused to apply the safeguards contained in the regulations and affirmed the action of the Air Force.

(8) Plaintiffs further appealed to the Board of Appeals and Review, United States Civil Service Commission, Washington, D. C. within the time allowed for such appeals. On February 19, 1962 the Board of Appeals and Review of the United States Civil Service Commission affirmed the decision of the First Civil Service Regional Office. Such action by the Board of Appeals and Review is final and no further administrative remedy is available to the plaintiffs.

(9) The United States Civil Service Commission and the Air Force, in violation of the regulations of the Air Force, upheld the reduction in force and the separation from the service of the plaintiffs.

(10) No prior application for this or any other relief has been made to this or any other Court.

(11) Plaintiffs have no other relief available except by the relief sought herein.

WHEREFORE, the plaintiffs pray for the following relief:

(1) That the Court declare that the action of the Secretary of the Air Force was not consistent with and was in violation of Air Force Regulations AFM 40-1, R3.

(2) That mandatory injunction be entered reinstating and restoring the plaintiffs to their former employment or equivalent positions with back pay and allowances.

(3) For such other and further relief as the Court may deem fit and proper.

/s/ John J. Schlick

* * *

[Filed July 5, 1962]

A N S W E R

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, the defendants aver as follows:

1, 2 and 3. The defendants admit the allegations of paragraphs 1, 2 and 3.

4. The defendants admit that Presque Isle Air Force Base and Loring Air Force Base were established as separate competitive areas on March 27, 1953, for reduction in force purposes. Further answering, the defendants deny the remaining allegation of paragraph 4.

5 and 6. The defendants admit the allegations of paragraph 5 and 6.

7. The defendants admit that the plaintiffs appealed their reduction in force separation to the First Civil Service Regional Office in Boston, Massachusetts. Further answering, the defendants deny the remaining allegation of paragraph 7 except that they admit that the action of the Air Force was affirmed.

8. The defendants admit the allegations of paragraph 8.

9. The defendants deny the allegations of paragraph 9.

10. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

11. The defendants deny the allegations of paragraph 11.

Third Defense

The Court lacks jurisdiction to award the plaintiffs back pay.

Fourth Defense

The plaintiffs are not entitled to judgment as there were no substantial departures from applicable procedures in the administrative proceedings, no misconstruction of governing legislation and regulations, and no error going to the heart of the administrative determination involved in this action.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Robert B. Norris
Assistant United States Attorney

[Certificate of Service]

[Filed July 17, 1962]

EXHIBIT 1

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

In Reply Please Refer To
February 19, 1962
BAR:JAN:dhp

Mr. John J. Schlick
Attorney at Law
World Center Building
Washington 6, D. C.

Dear Mr. Schlick:

Further reference is made to the briefs submitted by you and your associate, Gerald L. Keenan, Esq., in the further appeal of Ralph Baxter, et al (thirty four appellants), from the decisions of the First Civil Service Regional Office sustaining the reduction-in-force actions accomplished in their cases on or about June 30, 1961, by the Department of the Air Force, at the Loring Air Force Base, Limestone, Maine.

The Board of Appeals and Review has fully considered the entire appellate record, including all the information presented to and developed by the First Civil Service Regional Office in this group of cases, as well as the representations submitted by you and Mr. Keenan on further appeal. The Department of the Air Force was afforded an opportunity by the Board to comment upon the representations submitted in behalf of the appellants. The Department indicated however that it would stand on the record developed at the Regional Office level.

In the further appeal the only issue that has been raised is whether the retention rights of the appellants, who were employees at Loring Air Force Base, or at its satellite stations (Caribou Air Station and Caswell Air Station), were violated as the result of an agency determination that they must compete for retention with employees at Presque Isle Air Force Base, a nearby installation which was disestablished. According to the record Presque Isle Air Force Base had, from its beginning in 1953 until

its disestablishment in 1961 (the eve of the reduction-in-force situation under consideration) been identified and publicized as a competitive area separate and apart from the Loring Air Force Base competitive area.

The appellants, whom you and Mr. Keenan represent, contend that their retention rights were violated by the broadening of their competitive area in view of the long standing identity of Presque Isle Air Force Base as a separate competitive area and because the Department of the Air Force was prohibited under the terms of its own regulations from requiring a merger or consolidation of two competitive areas especially when, as in this situation, a reduction in force was known to be imminent.

The First Civil Service Region approved the action taken in the case of each appellant you and Mr. Keenan represent, finding that the broadened competitive area used in the reduction in force was not contrary to or in violation of the Commission's Retention Preference Regulations or the Department of Air Force Regulations governing the establishment of competitive areas (AFM 40-1, R-3, Section 2, paragraph 2) and was not unfair from an equitable point of view.

On further appeal to this Board it is contended in behalf of the appellants that the First Civil Service Regional Office erred in its interpretation of the pertinent agency regulations governing the establishment of competitive areas and that its findings with respect to equitable considerations should be disregarded.

With respect to the alleged violation of agency regulations it is contended that Section 2c of Air Force Manual 40-1, Chapter R-3, effectively prevented the Department of the Air Force from merging the Presque Isle installation with its servicing activity, Loring Air Force Base, into a single competitive area.

Section 2 of Air Force Manual 40-1, Chapter R-3, which was in force at the time of the reduction-in-force situation is quoted in pertinent part:

"2. COMPETITIVE AREAS.

"a. FPM Chapter R3 prescribes the criteria for establishing competitive areas and the requirements for recording them. In

conformity with these criteria, competitive areas in the Air Force will be established in accordance with the following plan.

"(1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located will constitute one competitive area regardless of command jurisdiction.

"(2) Separate competitive areas will be established for activities in the commuting area which are serviced by different civilian personnel offices, even though the activities may be located at the same site.

"b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters, USAF, Washington 25, D.C., and will be accompanied by a complete justification therefor, including the following information:

"(1) Whether the competitive area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with career tenure in the Air Force.

"(2) Extent to which the proposed competitive area has independence of operation and organization, work function, and personnel administration.

"(3) The geographic location of the proposed competitive area in relation to the existing competitive area.

"(4) A statement as to whether a reduction in force is imminent. If so, information concerning number and types of positions affected, and their location with respect to competitive areas involved.

"(5) A list of any serviced activities in the commuting area, designating any which are in a separate competitive area from the servicing activity.

"(6) A statement from both the serviced and servicing activities concerned concurring in the proposed arrangement.

"c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of subparagraph "b" above, later consolidation can be effected only when the following conditions are met.

"(1) The serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

"(2) A reduction in force is not imminent in either activity at the time of the consolidation.

"d. Any competitive area which is established under "b" or "c" above will be made a matter of permanent record, including the date established in all affected civilian personnel offices."

The Board notes that in the brief you submitted you have emphasized "In any case" and "only" in citing Section 2c quoted just above. The Board construed that to be a suggestion that the scope and extent of Section 2c is quite broad.

The Board interprets Section 2c to mean that whenever a separate competitive area, as an exception to the plan described in Section 2a (1), (2), has been established within the framework of Section 2b, a subsequent consolidation of competitive areas can be accomplished only when both of the cited conditions under Section 2c are met. In other words, Section 2c is limited by its own terms to situations arising out of Section 2b and is not as broad in scope as you have suggested.

Applying the foregoing construction, which the Board believes is the only reasonable construction that can be placed on Section 2c, to the facts of record, it is plainly evident that if Section 2c has any application to the cases under consideration it must be established that prior approval had been sought and received from Headquarters, USAF for Presque Isle Air Force Base to be identified as a separate competitive area. The evidence of record clearly establishes that prior approval of Presque Isle Air Force Base as a separate competitive area was never obtained from Headquarters, USAF, but that the distinction it enjoyed as a

separate competitive area derived from a previous superceded regulation. The Board therefore concludes that Section 2c Chapter R-3 of the Air Force Regulations, relied upon by the appellants, was not applicable nor binding upon the Air Force when it determined that Presque Isle Air Force Base properly belonged in the same competitive area as Loring Air Force Base.

In making that determination the Board weighed the possible impact of the previous Air Force Regulations, because as has been indicated, it is a fact that Presque Isle Air Force Base had for a number of years prior to this reduction in force been identified as a separate competitive area.

The evidence of record establishes that when Presque Isle Air Force Base came into being the Air Force regulations in force at that time permitted field installations to identify themselves as competitive areas separate and apart from their servicing activity if separate command jurisdictions existed. Presque Isle Air Force Base was at that time under a different command jurisdiction than Loring Air Force Base and did in fact elect to identify itself as a separate competitive area.

It is of significance to note that the exception under which Presque Isle Air Force Base elected to be identified as a separate competitive area rested solely on the fact that it was under a different command jurisdiction and it was not necessary in such a case to seek and gain prior approval of Headquarters, U. S. Air Force. Had Presque Isle Air Force Base not been under a different command jurisdiction than Loring Air Force Base, it would have had no authority to establish itself as a separate competitive area, but would have had to seek and gain approval from Headquarters, USAF, in order to be identified as a separate competitive area.

In 1957 the Air Force regulations were changed with respect to the establishment of competitive areas. The notable change was the elimination of separate command jurisdiction as a basis upon which an activity could itself elect to be identified as a separate competitive area. That regulatory change had the effect of removing from the installations the

previous delegated right to establish separate competitive areas based on different command jurisdiction. Thereafter, any exception to the plan of competitive areas as set forth in subparagraph 2a of the regulations, would require prior approval of Headquarters, USAF, pursuant to subparagraph 2b. (As a matter of information subparagraphs 2a and 2b in the 1957 revision are substantially identical to paragraphs 2a and 2b of the regulations in force at the time of the reduction in force.)

In recognition of the fact that exceptions to the normal plan of competitive areas, which exceptions were based on previous regulations, may still have been valid and subsisting exceptions, the Air Force furnished instructions in Transmittal Sheet 119 (under which the 1957 revision was issued), advising its installations that in those cases in which competitive areas had been established under the provisions of the previous regulations which did not conform to the normal plan of competitive areas set forth in subparagraph 2a of the 1957 regulations, no change would be required. Since Presque Isle Air Force Base had elected, under the previous regulation permitting an exception based on separate command jurisdiction, to be identified as a separate competitive area and because it was in fact still under a separate command jurisdiction in 1957, the exception under which its separate identity had been established was still a valid and subsisting exception. Therefore, under the instructions furnished in Transmittal Sheet 119 Presque Isle Air Force Base was entitled to retain its separate identity at the time the revised regulations were issued.

In 1959 Presque Isle Air Force Base was placed under the same command jurisdiction as Loring Air Force Base and its satellite Stations. When that occurred, the exception upon which it had previously relied as a basis for retaining its identity as a separate competitive area, was no longer a valid and subsisting exception and Presque Isle Air Force Base became part of the same competitive area as Loring Air Force Base. Presque Isle Air Force Base could have retained its identity as a separate competitive area on or after the time it was placed under the same command jurisdiction as Loring Air Force Base, by seeking and gaining

approval from Headquarters, USAF, consonant with the conditions set forth in paragraph 2b of the Air Force Regulations. However, as has been found previously the record shows that prior approval was not sought nor obtained from Headquarters USAF. Therefore under the applicable Air Force regulations Presque Isle Air Force Base has since 1959 been part of the same competitive area as Loring Air Force Base.

It is also contended that the Air Force is precluded by estoppel from placing Presque Isle Air Force Base in the same competitive area as Loring Air Force Base because since 1959 and until the eve of the reduction in force, local officials at Loring Air Force Base had publicized that Presque Isle Air Force Base was a separate competitive area, and had processed a number of reductions in force identifying Presque Isle Air Force Base as a separate competitive area.

Turning again to the Air Force regulations, the Board has determined that had the Department of the Air Force neglected or failed to correct the situation at Presque Isle Air Force base and not required that it be included in the same competitive area as Loring Air Force Base, the Department of the Air Force would have been subject to challenge for not adhering to its own regulations. In the light of those circumstances, the Board believes that the doctrine of estoppel is not applicable to these cases.

The Board,having found from the evidence of record and the applicable Air Force Regulations, that the competitive area in which your clients competed for retention was proper, affirms the previous decisions of the First Civil Service Regional Office.

For the Commissioners:

Sincerely yours,

/s/ E. T. Groark
Chairman, Board of
Appeals and Review

EXHIBIT 6

REDUCTION IN FORCE APPEALS OF
EMPLOYEES OF THE DEPARTMENT OF THE AIR FORCE,
LORING AIR FORCE BASE, LIMESTONE, MAINE
INCLUDING CARIBOU AND CASWELL AIR FORCE STATIONS

DISPOSITION OF COMPETITIVE AREA ISSUE

STATEMENT OF FACTS

Sometime in March 1961, announcement was made by the Department of Defense, Washington, D.C., that a number of military installations would be deactivated and declared surplus to the defense needs. Among those listed was the Presque Isle Air Force Base, Presque Isle, Maine. Official notification thereof was given to the Base Commander through higher echelon on or about April 10, 1961. At the time of the decision to deactivate the Presque Isle Air Force Base and subsequently through the effective dates of the instant reduction in force, it was under the Command jurisdiction of the Eighth Air Force and Strategic Air Command. It was serviced for Civilian Personnel Administration by the Civilian Personnel Office at the Loring Air Force Base, Limestone, Maine, another Eighth Air Force and Strategic Air Command activity located within the same local commuting area. Caribou and Caswell Air Force Stations are two relatively small satellite activities under the Command of Loring Air Force Base and located also within the same commuting area.

Over a period of several years prior to the instant reduction in force caused by the deactivation of the Presque Isle Air Force Base, that Base was one competitive area for reduction in force purposes, separate from Loring Air Force Base which together with its two satellites, Caribou and Caswell Air Force Stations, was another competitive area for reduction in force purposes.

On March 27, 1953, a notice was issued by the Commanding Officer, Headquarters, 577th Air Defense Group, Presque Isle Air Force Base to the Civilian Personnel Officer, Limestone (now Loring) Air Force Base, reading as follows:

"1. It is the decision of this headquarters that it would be to the best interests of the Air Force to establish a separate competitive area for Presque Isle Air Force Base for reduction in force purpose.

"2. The establishment of a separate competitive area is authorized under the provisions of Chapter AF R3-2, Air Force Manual 40-1."

At that time Presque Isle was under the command jurisdiction of Air Defense Command and continued under a different command from Loring until 1959. In 1959 Presque Isle's mission changed and it then came under Strategic Air Command, the same as Loring. It was agreed by the agency that reductions in force have taken place at one or another of the two activities up to January or February 1961, after Presque Isle had become an Eighth Air Force and Strategic Air Command activity, the same as Loring. In all those reductions in force, Presque Isle and Loring were separate competitive areas. It was further agreed that a single competitive area was established for the first time since 1953 for the purpose of conducting the instant reduction in force resulting from the decision to deactivate and declare surplus the Presque Isle Air Force Base. This change was made on the basis of a teletype message from Headquarters, U. S. Air Force, Washington, D. C., dated May 1, 1961, disapproving a request for continuation of separate competitive areas for the two Bases. As a result, employees of both installations, Presque Isle and Loring with its two satellites were placed in competition for retention. This caused the appellants, who were serving in positions other than at Presque Isle to be adversely affected in the instant reduction in force because of their having lower retention preference standing than employees of the Presque Isle Air Force Base who were retained by position changes to Loring, Caribou, or Caswell.

The essence of the appellants' position on the issue of the competitive area is that express provisions of Air Force Civilian Personnel Regulations contained in Air Force Manual 40-1, Section 2, Paragraph 2. c. (2), prohibited a consolidation of competitive areas when reduction

in force is imminent in either activity at the time of the consolidation, that in this instance the Department of the Air Force arbitrarily violated its own Regulation and therefore the reduction in force was improper and should be disapproved.

FINDINGS AND RECOMMENDATION

The governing provision of the Civil Service Commission's Regulations are found in Section 20.201(b) of the Retention Preference Regulations. This reads as follows:

> "(b) Competitive area (1) Agencies shall establish competitive areas within which employees compete for retention under this Part.
>
> "(2) The competitive area is all or that part of an agency within which employees are assigned under a single administrative authority . . . In the field service, this standard is met when the competitive area covers a field installation within the local commuting area.
>
> "(3) Agencies may provide for competitive areas larger than those mentioned in subparagraph 2. Under exceptional circumstances, and with the prior approval of the Commission, an agency may establish a competitive area smaller than those mentioned in subparagraph 2."

Under this Regulation, the Department of the Air Force was empowered to establish a competitive area for reduction in force purposes to consist of one or more field activities and insofar as the Commission's Regulations are concerned, the establishment of a single competitive area to include all Strategic Air Command or all Air Force activities in the area was permissive and entirely proper for the instant reduction in force, notwithstanding the fact that in the past the two Bases, Presque Isle and Loring, were separate competitive areas for such purpose.

Under Civilian Personnel Regulations of the Air Force, published in Air Force Manual 40-1, Chapter R-3, Section 2, Paragraph 2 a.(1), the basic pattern for competitive areas in existence at the time of the instant actions provides that all Air Force activities in a commuting area

which are serviced by a single Central Civilian Personnel Office, wherever located, will constitute one competitive area, regardless of command jurisdiction. Paragraph 2.b. provides for exceptions to the basic pattern, states to whom request for exception is to be directed, namely, Director of Personnel, Headquarters, U. S. Air Force, Washington, D.C.

Paragraph 2c on which appellants rely reads as follows:

"c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of subparagraph "b" above, later consolidation can be effected only when the following conditions are met.

"(1) The serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

"(2) A reduction in force is not imminent in either activity at the time of the consolidation."

The current provision except for two changes under paragraph 2.b. has been in existence since August 7, 1957, when Transmittal Sheet No. 119 was issued by Headquarters, U. S. Air Force, to which was attached a revised Chapter R-3. This Transmittal Sheet announced that a basic pattern has been established for competitive areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction will be in the same competitive area, that where competitive areas have been established under the provisions of the former Chapter R-3 which do not conform to the requirements of the new regulations, no change will be required, and that activities desiring to change from atypical competitive areas to the basic pattern established by the new regulation will be governed by the provisions of paragraph 2.c. quoted above.

The Air Force policy on competitive areas, which was thus changed, as it was described in previous editions of Chapter R-3, Section 2, provided for establishment of competitive areas as follows:

"a. Competitive Area. Competitive areas in the Air Force will be established in accord with the plan indicated below. Each area

established must meet the criteria prescribed in Chapter R3, Federal Personnel Manual.

"(1) All activities which are serviced by a single central civilian personnel office located at the installation or activity will constitute one competitive area.

"(2) Where there are one or more activities in a commuting area located off the servicing base the following will apply:

"(a) If one or more activities are located physically separate and are serviced by a single civilian personnel office which is in the same local commuting area, they will be considered in the same competitive area as the servicing base unless a serviced activity is under a different command jurisdiction than the servicing installation. Under these circumstances that activity may be a different competitive area if the serviced activity decides that the best interests of the Air Force require that a separate competitive area be established for that activity.

"(b) If the activities are located physically together and are serviced by a single civilian personnel office, there will be one single competitive area covering all employees in the commuting area, regardless of command jurisdiction and whether or not the servicing civilian personnel office is in the same commuting area.

"(c) If the activities are located physically separate and are serviced by different civilian personnel offices, which are either in or outside the local commuting area, the competitive area may be the same or different. If all activities are under the same command jurisdiction the competitive area will be the same. If the command jurisdiction is different, an activity may be in a different competitive area if that activity decides that the best interests of the Air Force require that a separate competitive area be established for that activity."

Here again the Regulation provided for requests to Headquarters, U. S. Air Force for approval to establish competitive areas at variance with the foregoing instructions and specified the information to be submitted in support thereof. Imminence of reduction in force is not mentioned in the regulations in existence prior to 1957.

In the teletype message of May 1, 1961, which resulted in the establishment of a single competitive area for the first time since 1953, Headquarters, U. S. Air Force stated its position as follows:

". . . References herein to R-3 mean Chapter R3 of Air Force Manual 40-1 ..... Separate competitive areas for Presque Isle and Loring Air Force Bases were based on provisions in 1954 edition of R3 allowing separate competitive areas as excep(tion) to normal pattern when serviced installation under different command jurisdiction than servicing installation. At time separate comp(etitive) areas established, Presque Isle was under A.D.C. jurisdiction. That was only basis for exception. If both installations had been under Strategic Air Command, a single competitive area would have been required by 1954 regulation just as under current regulation ..... When Presque Isle became Strategic Air Command installation, basis for separate competitive areas ceased to exist and single competitive area automatically existed from date of trans(fer) of Command jurisdiction to Strategic Air Command. This would also have been case if 1954 regulation had not been changed by T(ransmittal) S(heet) 119 ... Basic policy in 1954 and current R3 is same. Both provide single competitive area for all activities in commuting area serviced by same CCPO (Central Civilian Personnel Office). Difference is only that 1954 regulation allowed local exception where activities under different command jurisdiction, while current R3 requires Headquarters, U. S. Air Force approval for this or any other exception to normal pattern. TS 119 withdrew this local auth(ority) for excep(tion) to standard pattern. On assumption that only exception in effect were those permitted by superceded regulation, TS 119 did not require such exception to

be submitted Headquarters, U. S. Air Force for approval. Applied to Presque Isle and Loring situation, this provision permitted continued use of previous excep(tion) clause for sep(arate) comp(etitive) areas based on sep(arate) command jurisdictions. This provision in TS 119 cannot be construed to permit indefinite continuance of an exception after basis for exception ceases to exist ... Para-(graph) 2c, Section 2, Chapter R-3, not applicable where separate competitive areas automatically revert to standard pattern of single area because basis for exception ceases to exist. Change occurred in 1959 and is not proximate to reduction in force imminent 1961 ... Your request for separate competitive areas for Presque Isle and Loring Air Force Bases cannot be approved. R(eduction) I(n) F(orce) resulting from closure Presque Isle must be conducted on basis Air Force is single employer in the commuting area that includes these two installations."

The reference to change in 1959 was to the time when the Presque Isle Air Force Base was changed to Strategic Air Command from a different command jurisdiction. In brief, it was the position of the Headquarters, U. S. Air Force that the two Bases were established as separate competitive areas as an exception to the requirement for a single competitive area because they were under separate command jurisdictions, that with the disappearance of this factor as a ground for exception, the standard pattern for competitive areas became applicable automatically as the exception became groundless, and the provisions regarding imminence of a reduction in force, which would apply if there was still ground for an exception based originally on separate command jurisdiction is not applicable. In our opinion, this is a valid and reasonable interpretation of the provisions of Air Force Manual 40-1, Chapter R-3, Section 2, Paragraph 2.

Furthermore, it must be recognized that the Department's basic policy calls for both activities to be one competitive area, and that they have heretofore existed as two areas by virtue of an exception to the basic policy. That exception must be regarded as having had existence by

leave of Headquarters, U. S. Air Force, subject to termination by that Headquarters, even when the two activities may have desired to continue the exception to the basic policy. On this premise, looking at the provision of the quoted paragraph 2.c. we construe it to say that while the activities themselves lacked authority to consolidate into one competitive area while a reduction in force was imminent, this did not preclude the consolidation by authority of Headquarters, U. S. Air Force, where such consolidation simply terminated an exception to the basic policy which exception, as we said, existed only by leave of that Headquarters. We construe Paragraph 2.c. as simply defining or limiting the authority under which activity commanders could consolidate separate competitive areas which had been previously established by way of an exception to the basic pattern either under the authority delegated in the regulations prior to 1957 or upon receipt of approval of an exception from Headquarters, U. S. Air Force. We do not construe it as a limitation on Headquarters, U. S. Air Force to terminate a previously established or approved exception to the basic pattern. This is borne out by the fact that Transmittal Sheet 119 states that activities desiring to change from atypical to the basic pattern will be governed by paragraph 2c.

As to the merits of the action of Headquarters in having a single competitive area for the instant reduction in force, we are of the opinion that consideration must be given to the fact that the Presque Isle Base, which is the older of the two, was not merely to have a partial reduction in its total complement, but was to be deactivated. If it were a separate competitive area, long time career employees, many with veteran's preference and with the highest retention preference standing at Presque Isle would face separation while, close by, at a newer Air Force Base under the same command jurisdiction, lower retention preference standing employees would remain untouched and unaffected although they lacked the career tenure or the veteran's preference or the length of service of their fellow Air Force, Strategic Air Command employees at Presque Isle. We think that Headquarters, U. S. Air Force was justified in avoiding such a result, and that it had the necessary authority to do so within the framework of its own Regulations, Chapter R3 Section 2.

We find that the establishment of a single competitive area by order of Headquarters, U. S. Air Force on May 1, 1961, was in accordance with Civil Service Commission and Air Force Regulations. We recommend no change in the competitive area as established by the Headquarters, U. S. Air Force.

[Filed July 31, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH K. BAXTER, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 727-62
	)	
JOHN W. MACY, JR., et al.,	)	
	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS

Plaintiffs by their attorney John J. Schlick move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact, and that plaintiffs are entitled to a judgment as a matter of law; as a basis thereof, reference is made to the attached Statement of Material Fact and Points and Authorities in Support of Motion for Summary Judgment.

/s/ John J. S chlick
Attorney for Plaintiffs

* * *

[Certificate of Service]

[Filed July 31, 1962]

STATEMENT OF MATERIAL FACT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Statement of Material Fact

1. Loring Air Force Base, Limestone, Maine (formerly Limestone Air Force Base), and Presque Isle Air Force Base, Presque Isle, Maine, were established as separate competitive areas for reduction in force purposes on March 27, 1953. (Exhibit A.)

2. Each of the facilities were identified and publicized as separate competitive areas from the beginning in March 1953 until the disestablishment of Presque Isle Air Force Base in 1961. (Exhibit 1 of group of 16 exhibits, p. 1.)

3. Both facilities were at all times serviced for Civilian Personnel Administration by the Civilain Personnel Office at the Loring Air Force Base. (Exhibit G and Exhibit 6 of group of 16 exhibits, p. 46.) The facilities were established as separate competitive areas in 1953 under Air Force regulations (Chapter AF R3-2, Air Force Manual 40-1) which provided:

> "2(b) All activities which are in the same local commuting area and are serviced by a single central civilian personnel office, which also is located within the same commuting area, will be considered as part of the same competitive area as the servicing installation, unless a serviced activity, which

> is under a different command jurisdiction than the servicing installation, decides that the best interests of the Air Force require that a separate competitive area be established for that activity." (Exhibit B.)

At that time Presque Isle was under the jurisdiction of the Air Defense Command and Loring was under the Strategic Air command. (Exhibit 6 of group of 16 exhibits. pp. 46-47.)

4. On March 31, 1954 the Air Force regulations pertaining to competitive areas for reduction in force purposes were amended but still provided for the continued separate competitive areas if each facility was under a different command jurisdiction. (Exhibit C.) At the time of the amendment, each Air Force Base continued to be under a different command jurisdiction.

5. The applicable regulations pertaining to competitive areas for reduction in force purposes were revised on August 7, 1957 to read as follows:

> "2. COMPETITIVE AREAS.
>
> a. FFM Chapter R3 prescribes the criteria for establishing competitive areas and the requirements for recording them. In conformity with these criteria, competitive areas in the Air Force will be established in accordance with the following plan.
>
> (1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located, will constitute one competitive area, regardless of command jurisdiction.
>
> (2) Separate competitive areas will be established for activities in the commuting area which are serviced by different civilian personnel offices, even though the activities may be located at the same site.
>
> b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel,

Headquarters USAF, Washington 25, D. C., and will be accompanied by a complete justification therefor, including the following information:

(1) Whether the competitive area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with career tenure in the Air Force.

(2) Extent to which the proposed competitive area has independence of operation and organization, work function, and personnel administration.

(3) The geographic location of the proposed competitive area in relation to the existing competitive area.

(4) A statement that a reduction in force is not imminent in the competitive area.

(5) A list of any serviced activities in the commuting area, designating any which are in a separate competitive area from the servicing activity.

(6) A certification that both the serviced and servicing activities concerned concur in the proposed arrangement.

c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of subparagraph "b" above, later consolidation can be effected only when the following conditions are met.

(1) Both the serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

(2) A reduction in force is not imminent in either activity at the time of the consolidation.

d. Any competitive area which is established under "b" or "c" above will be made a matter of permanent record including the date established in all affected civilian personnel offices." (Exhibit D.)

6. The revised regulations were transmitted with Transmittal Sheet No. 119 (Exhibit E) which provided in part as follows:

"Any administrative plans or systems currently in effect, which were established under former regulations or by approval of this Headquarters, will be resubmitted if it is desired to continue them. An exception is made in the case of competitive areas, which is covered below.

"A basic pattern has been established for competitive areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction, will be in the same competitive area. Where competitive areas have been established under the provisions of the former Chapter AF R3, which do not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices. The record also will include the regulatory or other authority, and date, which permitted establishment of the competitive areas concerned. Activities desiring to change from a typical competitive areas to the basic pattern established by this regulation will be governed by the provisions of paragraph 2c, section 2, of this chapter."

7. The regulations were again revised on February 25, 1960 but the pertinent sections remain substantially the same.

8. In July of 1959, Presque Isle Air Force Base was changed from the Air Defense Command jurisdiction and thereafter both Bases were under the same command jurisdiction. (Exhibit G and Exhibit 1 of group of 16 exhibits, p. 5.)

9. After July 1959 both facilities continued to be separate competitive areas for reduction in force purposes until May 1, 1961. (Exhibit 1 of group of 16 exhibits, p. 1.)

10. Reductions in force have taken place on the basis of separate competitive areas at one or another of the facilities up to February 1961. (Exhibit 6 of group of 16 exhibits, p. 47.)

11. In March of 1961, an announcement was made by the Department of Defense that Presque Isle Air Force Base would be deactivated and declared surplus. On that date a reduction in force became imminent.

12. On May 1, 1961 a single competitive area was established "on the basis of a teletype message from Headquarters, U. S. Air Force, Washington, D. C. * * * disapproving a request for continuation of separate competitive areas for the two Bases." (Exhibit H and Exhibit 6 of group of 16 exhibits, p. 47.)

13. During the latter part of May 1961, plaintiffs were notified that they would be separated due to reduction in force as of June 30, 1961.

14. Plaintiffs have exhausted their administrative remedies.

Memorandum of Points and Authorities in Support of Motion for Summary Judgment

1. The Air Force over a period of years promulgated regulations governing reductions in force which were supplementary to Civil Service Regulations. On August 7, 1957 these regulations were revised and certain procedural safeguards were added by section 2c which provided as follows:

"2. COMPETITIVE AREAS.

c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of subparagraph 'b' above, later consolidation can be effected only when the following conditions are met. (Emphasis supplied)

(1) The serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

(2) A reduction in force is not imminent in either activity at the time of the consolidation.

Headquarters, U. S. Air Force takes the position that the consolidation of the bases into one competitive area was automatic when both came under the same command jurisdiction. This could not be so without violating their own regulations. The two conditions cited in section 2c of the regulations must be met.

The Air Force must rigorously follow its own regulations in effecting reductions in force. In Vitarelli v. Seaton, 359 U.S. 535, at 546-547, 3 L. Ed. 2d 1012, 1021, 79 S. Ct. 968, Mr. Justice Frankfurter in a separate opinion stated:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. See Securities & Exch. Com. v. Chenery Corp. 318 US 80, 87, 88, 87 L Ed 626, 632, 633, 63 S Ct. 454. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. * * * This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so."

The First Civil Service Region interpreted the Air Force position to mean that the regulations are not binding on Headquarters, U. S. Air Force. In their findings and recommendations they "construe paragraph 2c as simply defining or limiting the authority under which activity commanders could consolidate separate competitive areas which had been previously established by way of an exception to the basic pattern either under the authority delegated in the regulations prior to 1957 or upon receipt of approval of an exception from Headquarters, U. S. Air Force."

The Air Force is bound by its own regulations. In Service v. Dulles, 354 U. S. 363, at 372, 1 L. Ed. 2d 1403, 1410, 77 S. Ct. 1152, the Court states:

> "* * * Second, petitioner contends that the Secretary's action is subject to attack under the principles established by

this Court's decision in United States ex rel. Accardi v. Shaughnessy, 347 US 260, 98 L ed 681, 74 S Ct. 499, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. * * * Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first."

The First Civil Service Region further attempts to justify its decision on the ground that Presque Isle was an older Air Force base with employees of longer standing then Loring Air Force Base, and that it would not be fair to discharge these employees or transfer them to other Air Force bases in the United States and let the Loring Air Force employees remain. It is not the function of the Civil Service Commission to sit as a court of equity. It is the duty of the Civil Service Commission to apply the law as it is.

As the Court further stated in the Service case, supra. p. 373:

" * * * We do not understand the respondents to dispute that the principle of the United States ex rel. Accardi v. Shaughnessy (US) supra, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment." (Emphasis supplied)

On appeal to the United States Civil Service Commission, Board of Appeals and Review, the Board interpreted section 2c to mean that the cited conditions of the section must be met only when an exception to the basic pattern had "been established within the framework of Section 2b." The Board then decided that since Presque Isle Air Force Base had never sought or obtained approval from Headquarters, U. S. Air Force to be a separate competitive area section 2c of the regulations was not binding upon the Air Force.

When the regulations were revised in 1957, establishing the basic pattern which required that Presque Isle and Loring Air Force Bases constitute one competitive area, an exception was made by the Department of the Air Force and communicated by Transmittal Sheet No. 119 which provided in part as follows:

> "Any administrative plans or systems currently in effect, which were established under former regulations or by approval of this Headquarters, will be resubmitted if it is desired to continue them. An exception is made in the case of competitive areas, which is covered below.
>
> "A basic pattern has been established for compeititve areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction, will be in the same competitive area. Where competitive areas have been established under the provisions of the former Chapter AF R3, which do not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices. The record also will include the regulatory or other authority, and date, which permitted establishment of the competitive areas concerned. Activities desiring to change from atypical competitive areas to the basic pattern established by this regulation will be governed by the provisions of paragraph 2c, section 2, of this chapter." (Emphasis supplied)

The effect of the interpretation of section 2c by the Board of Appeals and Review is that the exception granted by the Air Force as stated in Transmittal Sheet No. 119 was not the same as the exception provided for in section 2b because is was not sought by Presque Isle Air Force Base. There is no requirement that an exception be sought only that an exception be granted. Nor do the regulations provide for different

kinds of exceptions. Transmittal Sheet No. 119 clearly grants an exception to the basic pattern for Presque Isle Air Force Base. This exception is the same as if an exception had been granted pursuant to a request under section 2b of the regulations. It is well established that the law does not require a futile act.

Regulations enacted by administrative agencies pursuant to delegated power have the force and effect of law. See 42 Am. Jur., Public Administrative Law §102; Columbia Broadcasting System v. United States, 316 U.S. 407, at 418, 86 L. Ed. 1563, 1571; Standard Oil Company of California v. Charles G. Johnson, 316 U.S. 481, at 484, 86 L. Ed. 1611, 1615, 62 S. Ct. 1168; United States ex rel. Accardi v. Schaughnessy, 347 U.S. 260, at 265, 98 L. Ed. 681, 686, 76 S. Ct. 499.

The same rules of construction which apply to statutes govern the construction and interpretation of administrative rules and regulations. See Miller v. United States, 294 U.S. 435, at 439, 79 L. Ed. 977, 981, 55 S. Ct. 440; 42 Am. Jur., Public Administrative Law §101.

The interpretation of regulations presents a question of law where the meaning of the words is clear and there is no ambiguity. See W. P. Brown & Sons Lumber Co. v. Louisville & N.R. Co., 299 U.S. 393, at 397, 81 L. Ed. 301, 304, 57 S. Ct. 265.

The regulations issued by the Air Force are clear. There is no ambiguity in the meaning of the words. The Transmittal Sheet does not change the meaning. Under the regulations the Air Force is prohibited from consolidating the subject Bases into one competitive area unless the two requirements of section 2c are met. In the instant case, it is admitted that neither of the requirements were met.

The contention that the provision in Transmittal Sheet No. 119 "cannot be construed to permit indefinite continuance of an exception" cannot be accepted upon analysis of the language. The Transmittal Sheet makes the exception a matter of permanent record as thoroughly as if it had been made so under section 2d of the regulations. Further the provisions of section 2c are made applicable.

The Air Force allowed the practice of separate competitive areas to exist from the very beginning in 1953 until the disestablishment in 1961 of Presque Isle Air Force Base. During this time reductions in force were processed at one or another of the Bases up to early 1961. An administrative practice that has been consistently and generally unchallenged will not be overturned except for cogent reasons. See Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, at 315, 77 L. Ed. 796, 807, 53 S. Ct. 350. The fact that Presque Isle was being deactivated and not merely having a partial reduction in its complement did not license the Air Force to disregard its own regulations.

Respectfully submitted,

/s/ John J. Schlick
* * *
Attorney for Plaintiffs

[Certificate of Service]

EXHIBIT A

HEADQUARTERS
528TH AIR DEFENSE GROUP
PRESQUE ISLE AIR FORCE BASE
Presque Isle, Maine

DPCP 230 27 Mar 1953

SUBJECT: Reduction-in-Force Competitive Area

TO: Civilian Personnel Officer
Limestone Air Force Base
Limestone, Maine

1. It is the decision of this headquarters that it would be to the best interests of the Air Force to establish a separate competitive area for Presque Isle Air Force Base for reduction-in-force purpose.

2. The establishment of a separate competitive area is authorized under the provisions of Chapter AF R3-2, Air Force Manual 40-1.

FOR THE COMMANDING OFFICER:

/s/ Lawrence F. Oswalt
Major, USAF
Adjutant

Separate competitive area established under Sect. 2, Para 2a (2) (a) AF R3, dated 31 Mar 54. No change required of 1 Sept 57 revisions, See Transmittal Sheet 119.

EXHIBIT B

Attachment 3
CPL 2-53

Section 2

BASIC FACTORS IN REDUCTION IN FORCE

*1. DETERMINATION OF RETENTION PREFERENCE.

Retention preference is the relative right of an employee to be retained in a position during a reduction in force. Competing employees with current official performance ratings of "Satisfactory"

or better will be placed in groups and subgroups for retention-preference purposes in accordance with their tenure of employment and veteran preference.

a. Tenure of Employment.

(1) Employees are placed in tenure groups I, II or III, according to tenure of employment, for retention-preference purposes in accordance with Section 20.4, Civil Service Regulations. For classifying employees into these tenure groups, see Table I, "Tenure Groups" in the appendix.

(2) Employees in the competitive service, who would be in Group I except for the fact that they are currently serving under indefinite promotion, will be considered in Group I with respect to positions at and below their permanent grade level. Employees serving in excepted positions, who would be in Group I except for the fact that they have been indefinitely promoted while serving in their current competitive area, will be considered in Group I with respect to positions in their current competitive area at and below their permanent grade level.

(3) Employees serving in the competitive service under temporary appointment, or in the excepted service under appointment limited to one year or less, and employees serving under any type of appointment with current official performance ratings of "Unsatisfactory" have no retention preference and are not placed in tenure groups.

b. Veteran Preference. Within each tenure group, persons entitled to veteran preference are in subgroup "A" and others are in subgroup "B". Preference will be recorded for any employee eligible under the Veterans Preference Act of 1944, in accordance with Chapter V1, Federal Personnel Manual.

c. Statutory Retention Rights. Employees who have been restored after military service in accordance with the Universal Military Training and Service Act have one-year statutory retention rights in the positions to which restored, and notices will be given only as provided in paragraph 4c of section 1. For purposes of

determining retention order, however, they will be placed in tenure group I or II in accordance with a above.

d. Changes Between Pay Method Categories. The permanent grade level for an employee who has changed to a position in a different pay method category, (e.g., from Classification Act to Wage Board, or viceversa) will be determined in accordance with Table II, "Table of Grade Equivalents by Skills Levels," in the appendix.*

2. DETERMINATION OF RETENTION ORDER. Before the order in which employees are to be selected for reduction in force action can be determined, the competitive area and the competitive levels must be established.

a. Competitive Area. Overall criteria for competitive areas are prescribed in Chapter R3, Federal Personnel Manual.

(1) Competitive areas in the Air Force are established as follows:

(a) All activities which are serviced by a single central civilian personnel office located at the installation or activity will constitute one competitive area.

(b) All activities which are in the same local commuting area and are serviced by a single central civilian personnel office, which also is located within the same commuting area, will be considered as part of the same competitive area as the servicing installation, unless a serviced activity, which is under a different command jurisdiction than the servicing installation, decides that the best interests of the Air Force require that a separate competitive area be established for that activity.

(c) All activities which are in the same local commuting area, and which are serviced by a single central civilian personnel office located outside the commuting area, will be considered to be in one competitive area, unless a serviced activity, which is under a different command jurisdiction than the servicing installation, decides that the best interests of the Air Force require that a separate competitive area be established for that activity.

(2) If a competivie area which is at variance with these instructions is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters USAF, Washington 25, D.C., and will be accompanied by a complete justification therefor, including the following information.

(a) Whether the area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with permanent tenure in the Air Force.

(b) Extent to which the proposed area has independence of operation, work function, and personnel administration.

(c) Extent to which the personnel complement of the proposed area is organized independently and is clearly distinguishable from the personnel complement of the basic competitive area.

(d) The geographic location of the proposed area in relation to the basic competitive area.

b. Competitive Level.

(1) A competitive level includes all positions in a competitive area in the same grade, line of work, trade, or profession (whether or not they have different titles or different pay rates) which are enough alike that interchange of personnel in both directions is feasible. * ~~Exception is made in the case of an employee who is given an assignment to higher grade duties without corresponding promotion under authority of Civil Service Departmental Circular No. 671, Supplement 11. The competitive level of the position to which he is conditionally assigned will be the competitive level in which he competes with other employees. However, his reassignment rights under paragraph 3, section 4, will be based on the grade level at which he is being paid.~~* Positions under the classification Act of 1949 will not be included in the same competitive level with positions not subject to that Act. Positions in the excepted service will not be in the same competitive level as positions in the competitive service. * In areas outside the 48 States and the District of Columbia, positions

covered by compensation schedules for positions occupied by U.S. citizen employees will not be in the same competitive level as positions occupied by noncitizen employees.* General clerical positions below the GS-4 level may be considered as usually, but not necessarily interchangeable within the grade. The determination will be made on the basis of job requirements and official duties of the positions involved. Competitive levels will be established within each competitive area in advance of any reduction in force, and will be in accordance with (a) the criteria contained in Chapter R3, Federal Personnel Manual, (b) information available in the classification and wage branch concerning position requirements, and (c) information available in the placement branch relating to similarity of qualification requirements.

(2) Separate competitive levels will be established for apprentice positions which are part of apprentice training programs authorized in accordance with Chapter AF T10. All apprentices serving at the first pay level will comprise a single competitive level regardless of trade. Apprentices who have advanced from the first pay level will be placed in competitive levels by trade and by successive pay levels within trades.

c. Retention Records. All central civilian personnel offices will maintain reduction in force data necessary for determining order of retention *in accordance with paragraph 10, Section III, Chapter 3, of AFM 40-2.*

d. Retention Register. Prior to a reduction in force a retention register will be prepared for the competitive levels affected, in accordance with *Section 20.4(d), Civil Service Regulations, and paragraph 10. b, Section III, Chapter 3, of AFM 40-2.*

EXHIBIT C

Section 2

BASIC FACTORS IN REDUCTION IN FORCE

1. DETERMINATION OF RETENTION PREFERENCE.

Retention preference is the relative right of an employee to be retained in a position which necessary to reduce staff. Competing employees with current official performance ratings of "Satisfactory" or better will be placed in tenure groups and subgroups for retention preference purposes in accordance with their tenure of employment and veteran preference.

a. Tenure of Employment

(1) Employees are placed in Tenure Groups I, II or III, according to tenure of employment, for retention preference purposes in accordance with section 20.4, Civil Service Regulations. For classifying employees into these tenure groups, see Table I, "Tenure Groups," in the appendix.

(2) Employees in the competitive service, who would be in Tenure Group I except for the fact that they have been promoted indefinitely, will be considered in Tenure Group I with respect to positions at and below their permanent grade level. Employees serving in excepted positions, who would be in Tenure Group I except for the fact that they have been promoted indefinitely, * * will be considered in Tenure Group I with respect to positions in their current competitive area at and below their permanent grade level.

(3) Employees serving in the competitive service under temporary appointment, or in the excepted service under appointment limited to one year or less, and employees serving under any type of appointment with current official performance ratings of "Unsatisfactory" have no retention preference and are not placed in tenure groups.

b. Veteran Preference. Within each tenure group, persons entitled to veteran preference are in subgroup "A" and others are in subgroup "B". Preference will be recorded for any employee eligible under the Veterans' Preference Act of 1944, in accordance with Chapter V-1, Federal Personnel Manual.

c. Statutory Retention Rights. Employees who have been restored in accordance with the requirements of section 9 of the Universal Military Training and Service Act have one-year statutory retention rights, and notices will be given only as provided in paragraph 7c of section 4. For purposes of determining retention order, however, they will be placed in Tenure Group I or II in accordance with a above.

2. DETERMINATION OF RETENTION ORDER. Before the order in which employees are to be selected for reduction in force action can be determined, the competitive area and the competitive levels must be established and recorded.

a. Competitive Area. Competitive areas in the Air Force will be established in accordance with the plan indicated below. Each area established must meet the criteria prescribed in Chapter R3, Federal Personnel Manual.

(1) All activities which are serviced by a single central civilian personnel office located at the installation or activity will constitute one competitive area.

(2) Where there are one or more activities in a commuting area located off the servicing base the following will apply:

(a) If one or more activities are located physically separate and are serviced by a single civilian personnel office which is in the same local communing area, they will be considered by the same competitive area as the servicing base unless a serviced activity under a different command jurisdiction than the servicing installation. Under these circumstances that activity may be a different competitive area if the serviced activity decides that the best interests of the Air Force require that a separate competitive area be established for that activity.

(b) If the activities are located physically together and are serviced by a single civilian personnel office, there will be one single competitive area covering all employees in the commuting area, regardless of command jurisdiction and whether or not the servicing civilian personnel office is in the same commuting area.

(c) If the activities are located physically separate and are serviced by different civilian personnel offices, which are either in or outside the local commuting area, the competitive area may be the same or different. If all activities are under the same command jurisdiction the competitive area will be the same. If the command jurisdiction is different, an activity may be in a different competitive area if that activity decides that the best interests of the Air Force require that a separate competitive area be established for that activity.

(3) If a competitive area which is at variance with these instructions is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters USAF, Washington 25, D.C., and will be accompanied by a complete justification therefor, including the following information:

(a) Whether the area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with permanent tenure in the Air Force.

(b) Extent to which the proposed area has independence of operation, work function, and personnel administration.

(c) Extent to which the personnel complement of the proposed area is organized independently and is clearly distinguishable from the personnel complement of the basic competitive area.

(d) The geographic location of the proposed area in relation to the basic competitive area.

b. Competitive Level.

(1) A competitive level includes all positions in a competitive area in the same grade, line of work, trade, or profession (whether or not they have different titles or different pay rates) which are enough alike that interchange of personnel is feasible. Positions under the Classification Act of 1949 will not be included in the same competitive level with positions not subject to that Act. Positions in the excepted service will not be in the same competitive level as positions in the competitive service. In areas outside the 48 States and the District of Columbia, positions covered by compensation schedules for positions occupied by U.S. citizen employees will not be in the same competitive level as positions occupied by noncitizen employees. General clerical positions below the GS-4 level may be considered usually, but not necessarily, interchangeable within the grade. The determination will be made on the basis of job requirements and official duties of the positions involved. Competitive levels will be established within each competitive area in accordance with (a) the criteria contained in Chapter R3, Federal Personnel Manual, and (b) information available in the civilian personnel office as to position requirements and qualification requirements.

(2) Separate competitive levels will be established for apprentice positions which are part of apprentice training programs authorized in accordance with Chapter AF T 10. All apprentices serving at the first pay level will comprise a single competitive level regardless of trade. Apprentices who have advanced from the first pay level will be placed in competitive levels by trade and by successive pay levels within trades.

c. Retention Records. All central civilian personnel offices will maintain reduction in force data necessary for determining order of retention in accordance with paragraph 10, section III, Chapter 3, of AFM 40-2.

d. Retention Register. Prior to a reduction in force a retention register will be prepared for the competitive levels affected, in accordance with section 20.4(d), Civil Service Regulations, and paragraph 10.b, section III, Chapter 3, of AFM 40-2.

*3. DETERMINATION OF PERMANENT GRADE LEVEL

a. Change of Employee Between Positions. If an employee is changed from a position in one pay category to a position in another pay category (e.g., Classification Act to Wage Board), or from a position in one pay schecule to one in another pay schedule within the same category (e.g., GS to CPC or WB to WF), his permanent grade level will be determined on the basis of a comparison of the level of the skills and responsibilities of the two positions as shown on Table II, "Table of Grade Equivalents By Skill Levels" in the appendix. This table will be used only for the purpose of determining an employee's permanent grade level if he is changed from a position in one pay schedule or category to another.

b. Change of Position Between Pay Categories or Schedules. If a position is moved, without a change in duties, from one pay category to another or from one pay schedule to another within the same category, the tenure group standing of the incumbent will not be affected. For instance, an employee who was serving at his permanent grade level in a position which was moved from a regular Wage Board schedule to a foreman schedule would still be permanent in the grade on the foreman schedule to which the position was converted and would be in Tenure Group I on the retention register for the competitive level. If he has been promoted indefinitely, the foreman grade to which his last permanent grade was converted would become his new permanent grade level. If he has been promoted indefinitely and the position last held on a permanent basis was not converted, the grade of that position will remain his permanent grade level.

c. Apprentices and Former Apprentices. The permanent grade level of apprentices or former apprentices who were probationally appointed as apprentices in the Air Force on or before 1 September 1950 will be determined as follows:

(1) If the probational apprentice completed satisfactorily at least the first training period, but less than half, of the apprenticeship (or was accepted for a training period above the first training period but within the first half of the apprenticeship) his permanent grade level will be that of the helper level in the same trade.

(2) If the probational apprentice completed satisfactorily at least half of his apprenticeship (or was accepted for a training period in the second half of the apprenticeship) his permanent grade level will be that of the junior level in the same trade.

(3) If the probational apprentice achieved journeyman status as a result of successful completion of the apprenticeship program on or before 1 September 1950 and his promotion to a journeyman position was effected on a permanent basis his permanent grade level will be that of the journeyman position or any higher grade to which promoted on or before 1 September 1950.*

EXHIBIT D

Section 2

PLANNING A REDUCTION IN FORCE

[Section 2, FPM Chapter R3]

1. ADVANCE PLANNING

a. The importance of advance planning for a reduction in force cannot be too strongly emphasized. When it has been determined that a reduction in force is to be effected, plans will be initiated as far in advance as possible in order that the policies outlined in Section 1 will be carried out effectively. This will require close cooperation among the civilian personnel officer, manpower officers, and operating officials. Organizational changes, including realignment of functions and positions, which may be necessary because of a curtailment of staff, will be completed wherever possible before personnel actions based on reduction in force are effected.

b. When the probable extent and effect of a reduction in force have been ascertained, plans to maintain the most efficient organization possible with minimum interruption of continuing essential operations will be initiated and carried out. The following steps are basic to advance planning for a reduction in force.

(1) Identifying the positions essential to the continuing mission which will be retained.

(2) Filling vacant continuing positions with qualified employees of the installation.

(3) Confining recruitment to those positions for which there is a critical need, and for which qualified employees are not available at the installation.

(4) Shifting the best qualified personnel to continuing positions for which they are qualified.

(5) Anticipating the expected decrease in personnel through normal attrition by obtaining information concerning possible resignations, retirement, and other separation actions.

(6) Assuring that any anticipated or pending actions of separation for inefficiency or disqualification are effected independently of and prior to reduction in force, to avoid the possibility of extending to unqualified employees the benefits of the program for separated career employees.

2. COMPETITIVE AREAS

a. FPM Chapter R3 prescribes the criteria for establishing competitive areas and the requirements for recording them. In conformity with these criteria, competitive areas in the Air Force will be established in accordance with the following plan.

(1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located, will constitute one competitive area, regardless of command jurisdiction.

(2) Separate competitive areas will be established for activities in the commuting area which are serviced by different civilian personnel offices, even though the activities may be located at the same site.

b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters USAF, Washington 25, D.C. and will be accompanied by a complete justification therefor, including the following information:

(1) Whether the competitive area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with career tenure in the Air Force.

(2) Extent to which the proposed competitive area has independence of operation and organization, work function, and personnel administration.

(3) The geographic location of the proposed competitive area in relation to the existing competitive area.

(4) A statement that a reduction in force is not imminent in the competitive area.

(5) A list of any serviced activities in the commuting area, designating any which are in a separate competitive area from the servicing activity.

(6) A certification that both the serviced and servicing activities concerned concur in the proposed arrangement.

c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of sub-paragraph "b" above, later consolidation can be effected only when the following conditions are met.

(1) Both the serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

(2) A reduction in force is not imminent in either activity at the time of the consolidation.

d. Any competitive area which is established under "b" or "c" above will be made a matter of permanent record including the date established in all affected civilian personnel offices.

EXHIBIT E

7 AUG 57 AFM40-1

AIR FORCE CIVILIAN PERSONNEL MANUAL

AF Manual)
No. 40-1)

Department of the Air Force
Washington, D.C., 7 August 1957

TRANSMITTAL SHEET NO. 119

REDUCTION IN FORCE AND PROGRAM
FOR SEPARATED CAREER EMPLOYEES

Transmitted herewith is revised Chapter AF R3, "Reduction in Force and Program for Separated Career Employees." This chapter has been reorganized to bring it in line with the organization of Chapter R3 of the Federal Personnel Manual. The first six sections parallel the first six sections of the FPM Chapter, with some variations and additions in the remainder of the chapter.

This revision represents changes necessary to bring the chapter up to date with extensive changes in Civil Service Regulations including the new definition of reduction in force, and changes considered desirable in the administrative provisions and requirements for reduction in force action.

Any administrative plans or systems currently in effect, which were established under former regulations or by approval of this Headquarters, will be resubmitted if it is desired to continue them. An exception is made in the case of competitive areas, which is covered below.

A basic pattern has been established for competitive areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction, will be in the same competitive area. Where competitive areas have been established under the provisions of the former Chapter AF R3, which do not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices. The record also will include the regulatory

or other authority, and date, which permitted establishment of the competitive areas concerned. Activities desiring to change from a typical competitive areas to the basic pattern established by this regulation will be governed by the provisions of paragraph 2c, section 2, of this chapter.

The computation of retention credits when preparing retention registers, currently provided for in paragraph 10b (1) (c) of Section III, Chapter 3 of AFM 40-2 will not be required after the effective date of this chapter. Service computation dates will be adjusted to include credit for "Outstanding" performance ratings at the time retention registers are prepared. No change will be made in the service computation dates recorded on the SF-7, "Service Record Card." This change will be reflected in a future revision to AFM 40-2.

In putting the regulation into effect, it will not be necessary to change retention registers which are already compiled and in use in order to conform to the provisions of paragraph 2, section 5, for listing employees by service computation dates. This changeover need not be completed until 31 December 1957 unless desired.

In view of the extensive changes in the revised Chapter AF R3, no listing of the changes made is included here; therefore, the entire chapter should be carefully reviewed to assure that all changes are noted.

This regulation will be effective 1 September 1957; except that if a reduction in force is currently in process, action will be completed with respect to notices already outstanding in accordance with the regulations under which the notices were issued. This regulation may be put into effect before 1 September, if desired; however, where there is more than one competitive area within the commuting area, an effective date earlier than 1 September must be agreed to by all civilian personnel offices serving installation in the same commuting area.

Minor changes have been made in paragraph 2b, section 6, and paragraph 4 of section 7 since issuance of advance copies of this chapter. All copies of the mimeographed chapter should be removed from the files and destroyed upon receipt of this transmittal.

Filing Instructions

Remove all pages now filed as Chapter AF R3 and file the attached complete revision.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

Official:
J.L. TARR,
Colonel, USAF
Air Adjutant General

THOMAS D. WHITE
Chief of Staff, United States
Air Force

Distribution data are contained in Appendix A of Chapter AF R3

EXHIBIT F

TS 148
25 FEB 60

AFM 40-1
AF R3.2

Section 2

[Use in conjunction with
Section 2, FPM Chapter R 3]

1. ADVANCE PLANNING

a. The importance of advance planning for a reduction in force cannot be too strongly emphasized. When it has been determined that a reduction in force is to be effected, plans will be initiated as far in advance as possible in order that the policies outlined in Section 1 will be carried out effectively. This will require close cooperation among the civilian personnel officer, manpower officers, and operating officials. Organizational changes, including realignment of functions and positions, which may be necessary because of a curtailment of staff, will be completed wherever possible before personnel actions based on reduction in force are effected.

b. When the probable extent and effect of a reduction in force have been ascertained, plans to maintain the most efficient organization possible with minimum interruption of continuing essential operations will be initiated and carried out. The following steps are basic to advance planning for a reduction in force.

(1) Identifying the positions essential to the continuing mission which will be retained.

(2) Filling vacant continuing positions with qualified employees of the installation.

(3) Confining recruitment to those positions for which there is a critical need, and for which qualified employees are not available at the installation.

(4) Shifting the best qualified personnel to continuing positions for which they are qualified.

(5) Anticipating the expected decrease in personnel through normal attrition by obtaining information concerning possible resignations, retirement, and other separation actions.

(6) Assuring that any anticipated or pending actions of separation for inefficiency or disqualification are effected independently of and prior to reduction in force, to avoid the possibility of extending to unqualified employees the benefits of the program for separated career employees.

2. COMPETITIVE AREAS

a. FPM Chapter R3 prescribes the criteria for establishing competitive areas and the requirements for recording them. In conformity with these criteria, competitive areas in the Air Force will be established in accordance with the following plan.

(1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located, will constitute one competitive area, regardless of command jurisdiction.

(2) Separate competitive areas will be established for activities in the commuting area which are serviced by different civilian personnel offices, even though the activities may be located at the same site.

b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. Requests will be forwarded through channels to the Director of Civilian Personnel, Headquarters USAF, Washington 25, D.C., and will be accompanied by a complete justification therefor, including the following information:

(1) Whether the competitive area proposed is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of employees with career tenure in the Air Force.

(2) Extent to which the proposed competitive area has independence of operation and organization, work function, and personnel administration.

(3) The geographic location of the proposed competitive area in relation to the existing competitive area.

(4) *A statement as to whether a reduction in force is imminent. If so, information concerning number and types of positions affected, and their locations with respect to competitive areas involved.*

(5) A list of any serviced activities in the commuting area, designating any which are in a separate competitive area from the servicing activity.

(6) A statement from both the serviced and servicing activities concerned concurring in the proposed arrangement.

Ex. F (Cont'd.)

c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of sub-paragraph "b" above, later consolidation can be effected only when the following conditions are met.

(1) The serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.

(2) A reduction in force is not imminent in either activity at the time of the consolidation.

d. Any competitive area which is established under "b" or "c" above will be made a matter of permanent record, including the date established, in all affected civilian personnel offices.

EXHIBIT G

DEPARTMENT OF THE AIR FORCE
STAFF MESSAGE DIVISION
UNCLASSIFIED MESSAGE

INCOMING

AF IN : 34235 (27 Apr 61) H/dug

ACTION: PCP-3 (4)

SMB C 137

WXAO59BRF113

MM RJEZHQ

DE RJWXBR 507

ZNR

M 26223OZ

FM SAC OFFUTT AFB NEBR

TO RJEZHQ/COFS USAF WASH DC

INFO RJEXD HB/SAF WESTOVER AFB MASS

BT

UNCLAS DPCA 33575,

FOR: AFPCP-F. SUBJ: COMPETITIVE AREAS - LORING AND PRESQUE ISLE AFB. A QUESTION HAS BEEN RAISED AS TO THE PROPRIETY OF RETAINING SUBJECT BASES IN SEPARATE COMPETITIVE AREAS. LORING AFB AND PRESQUE ISLE AFB HAVE BEEN SERVICED BY A COMMON CCPO SINCE ACTIVATION, AND DURING THIS PERIOD HAVE BEEN IN SEPARATE COMPETITIVE AREAS. BASED UPON PARAGRAPH 2A (2) (A) SECTION 2, CHAPTER R3, AFM 4Ø-1, OF THE OLD RIF REGULATIONS, AND BY REQUEST OF THE COMMANDER, PRESQUE ISLE AFB, THAT STATION WAS SET UP IN A SEPARATE COMPETITIVE AREA IN 1953. PRESQUE ISLE WAS UNDER ADC UNTIL JULY 1959 WHEN SAC TOOK THE BASE. THE CURRENT CRITERIA FOR ESTABLISHMENT OF COMPETITIVE AREAS WAS FURNISHED BY TRANSMITTAL SHEET 119 OF AFM 40-1. THE IMPLEMENTING INSTRUCTIONS IN THE TRANSMITTAL SHEET PROVIDED THAT WHERE COMPETITIVE AREAS HAD BEEN ESTABLISHED OTHER

THAN IN ACCORDANCE WITH THE NEW CRITERIA, THEY COULD BE RETAINED. IT IS SIGNIFICANT TO NOTE THAT T.S. 119 MAKES NO MENTION OF CONSOLIDATING COMPETITIVE AREAS SHOULD THE CONDITIONS UPON WHICH SEPARATE COMPETITIVE AREAS WERE ESTABLISHED CHANGE. PARAGRAPH 2C, SECTION 2, CHAPTER R3, PROVIDES THAT WHERE ATYPICAL COMPETITIVE AREAS ARE ESTABLISHED, THEY CANNOT BE CHANGED WHEN A RIF IS IMMINENT AT EITHER STATION. FURTHER CONSIDERATION SHOULD BE GIVEN TO THE FACT THAT NUMBEROUS RIFS HAVE BEEN ACCOMPLISHED OVER PAST YEARS UNDER THE EXISTING COMPETITIVE AREA STRUCTURE. IN THESE CASES, EMPLOYEES AT LORING AFB WERE NOT GIVEN OPPORTUNITY TO BUMP AT PRESQUE ISLE. THESE ACTIONS, AS WELL AS RIFS AT PRESQUE ISLE HAVE BEEN SUPPORTED BY COMMISSION APPEAL. TO CHANGE THIS STRUCTURE NOW WOULD NOT PROVIDE EQUAL TREATMENT TO LORING EMPLOYEES IF PRESQUE ISLE EMPLOYEES ARE NOW GIVEN BUMPING RIGHTS TO POSITIONS AT LORING. DURING THE USAF SURVEY OF LORING AFB IN 1959, THE TEAM REVIEWED THE COMPETITIVE LEVELS ESTABLISHED BY THE CCPO, AND MUST HAVE BEEN AWARE OF THE SEPARATE AREAS ESTABLISHED. SINCE THE SURVEY REPORT INTERPOSED NO OBJECTION TO THE ESTABLISHED AREAS, IT IS ASSUMED THAT SEPARATE AREAS WERE NOT CONSIDERED A VIOLATION OF AF OR COMMISSION POLICY. IN SUMMARY, SEPARATE COMPETITIVE AREAS WERE ESTABLISHED BY COMPETENT AUTHORITY UNDER EXISTING REGULATIONS. T.S. 119 ALLOWED CONTINUATION OF SEPARATE AREAS, AND HENCE IT IS REGULARTORILY SOUND. HISTORICAL ACCEPTANCE OF THIS ARRANGEMENT IS AN ESTABLISHED FACT. NO KNOWN CASE EXISTS OF EITHER EMPLOYEES OR UNIONS QUESTIONING SEPARATE AREAS. A CHANGE AT THIS EXTREMELY LATE DATE WOULD CAUSE DISRUPTION AND COULD STIMULATE ADDITIONAL APPEALS AND COMPLAINTS FROM LORING AFB PERSONNEL. YOUR SUPPORT AND EARLY REPLY IS REQUESTED.
BT
26/2234Z APR RJWXBR

EXHIBIT H

SECURITY CLASSIFICATION

JOINT MESSAGEFORM — UNCLASSIFIED

SPACE BELOW RESERVED FOR COMMUNICATION CENTER

Precedence		Type Msg (Check)			Accounting Symbol	Orig. or Refers to	Classification of Reference
		Book	Multi	Single		(27 Apr 61)	
Action	PRIORITY						
Info	PRIORITY		X		AF	AF IN 34235	UNCLA8

Special Instructions:

FROM
HQ USAF

TO:
SAC OFFUTT ABF NEBR

INFO: 8 AF WESTOVER AFB MASS

COORDINATIONS

AFPC-B 4	AFPCP-P-2
Fr. Kelson	Mr. Berman
F. Kelso 5/1/61	M. Berman
AFPCP-0-2-A	1 May 61

UNCLAS AFPCP-B-4

PART I. Reurmsg DPCA 33575. This msg in five parts. References herein to R3 mean Chapter R3 of AFM 40-1. PART II. Separate competitive areas for Presque Isle and Loring AFBs were based on provisions in 1954 edition of R3 allowing separate competitive areas as excep to normal pattern when serviced installation under different command jurisdiction than servicing installation. At time separate comp areas established, Presque Isle was under ADC jurisdiction. That was only basis for excep. If both installations had been under SAC, a single comp area would have been required by 1954 reg just as under current reg. Action of first CS Region in upholding separate comp areas cited separate command jurisdictions as basis. Review by survey team also prior to transfer to SAC. When Presque Isle became SAC installation, basis for separate comp areas ceased to exist and single comp automatically existed from date of trans of command jurisdiction to SAC. This would also have been case if 1954 reg had not been changed by TS 119. PART III. Basic policy in 1954 and current R3 is same. Both provide single comp area for all activities in commuting area serviced by same CCPO. Difference is only that 1954 reg allowed local excep where activities under different command jurisdiction, while current R3 requires Hq USAF approval for this or any other excep to normal pattern. TS 119 withdrew this local auth for excep to standard pattern. On assumption that only excep in effect were those permitted by superseded reg,

TS 119 did not require such excep be submitted Hq USAF for approval. Applied to Presque Isle and Loring situation, this provision permitted continued use of previous excep clause for sep comp areas based on sep command jurisdictions. This provision in TS 119 cannot be construed to permit indefinite continuance of an excep after basis for excep ceases to exist. PART IV. Para 2c, Sec 2, Chap R3 not applicable where sep comp areas automatically revert to standard pattern of single area because basis for excep ceases to exist. Change occurred in 1959 and is not proximate to RIF imminent 1961. PART V. Your request for sep comp areas for Presque Isle and Loring AFBs cannot be approved. RIF resulting from closure Presque Isle must be conducted on basis AF is single employer in the commuting area that includes these two installations.

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JOSEPH P. HOCHRESEN
Chief, Employee Program Division
Directorate of Civilian Personnel

[Filed August 13, 1962]

CROSS-MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and cross-move this Court for summary judgment on the grounds that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

Attached hereto and made a part hereof are certified copies of the official documents of the Department of the Air Force which pertain to this case, identified as Government Exhibits A through H; and certified copies of the official documents of the United States Civil Service Commission which pertain to this case, identified as Government Exhibits 1 through 16.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Robert B. Norris
Assistant United States Attorney

[Certificate of Service]

STATEMENT OF MATERIAL FACT AS TO WHICH THERE IS NO GENUINE ISSUE PURSUANT TO RULE 9 (h)

In this case, the defendants cross-move for summary judgment contending that there are no genuine issues of material fact present herein. Pursuant to Local Rule 9(h), the defendants state that they are in substantial agreement with the plaintiffs' "Statement of Material Facts" except as herein follows:

(1) With reference to the plaintiffs' No. 1., the action establishing Presque Isle Air Force Base as a separate competitive area for

reduction in force purposes, on March 27, 1953, was taken by the local authorities at Presque Isle, pursuant to the provisions of 2a(1) (b), Chap. AF 3-2, AFM 40-1. (Exh. A & B.)

(2) With reference to the plaintiffs' No. 9, this statement is incomplete. Although the local Air Force authorities at Presque Isle Air Force Base erroneously identified and publicized Presque Isle as a separate competitive area, from July, 1959 until May 1, 1961, Headquarters, U. S. Air Force, did not so identify it. The Department of the Air Force concluded that Presque Isle Air Force Base, by operation of current Air Force Regulations, "became part of the same competitive area as Loring Air Force Base" in July, 1959, (Exh. 1, p. 5), and continued in that status until its deactivation in June, 1961. (Exh. 1, pp. 5-6; Exh. H).

(3) With reference to the plaintiffs' No. 12, this statement is misleading. It is correct that on April 27, 1961, "a request for continuation of separate competitive areas for [Presque Isle and Loring]" was directed to Headquarters, U. S. Air Force. (Exh. 6, p. 2.) But, this request was disapproved on the grounds that Headquarters, U. S. Air Force took the position that the consolidation of the two Bases "occurred in 1959" because the "basis for separate competitive areas ceased to exist and single competitive areas automatically existed from the date of transfer of command jurisdiction to SAC." (Exh. H.) Because the 1959 consolidation was "not proximate to RIF imminent 1961," Headquarters, U. S. Air Force, concluded that "Para. 2c, Sec. 2 Chap. R3 [was] not applicable." (Exh. H.)

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Robert B. Norris
Assistant United States Attorney

[Filed August 13, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

This is an action to contest a reduction in force separation of these plaintiffs conducted by the Department of Air Force at and around Loring Air Force Base (Loring), Limestone, Maine. Specifically, the Plaintiffs, former employees at Loring, challenge the interpretation and application of certain Air Force regulations by the Department of the Air Force and the subsequent affirmation of this adverse action by the United States Civil Service Commission.

At the outset, the defendants wish to state their agreement with the plaintiffs that it is well-established that an administrative agency is bound by its own regulations and a substantial departure therefrom will invalidate the agency's action. But this is not the situation here. The issue in the instant case is whether the Air Force properly concluded that a certain regulation and an instruction issued therewith did not apply to the facts herein, and whether the Civil Service Commission was correct in affirming the judgment of the Air Force. Because this regulation and the instructions issued therewith are inapplicable to the instant case, as the record will show, the plaintiffs' reliance thereon is misplaced.

In 1953, Presque Isle Air Force Base (Presque Isle) was under the jurisdiction of the Air Defense Command (ADC). The nearby Base of Loring, however, was under the jurisdiction of the Strategic Air Command (SAC). Both bases were within the same commuting area and were serviced by the same Central Civilian Personnel Office. Because the two bases were then under a different command jurisdiction, the Commanding Office of Presque Isle decided that Presque Isle should be a separate competitive area for reduction in force purposes. Pursuant to 2a(1)(b), AF R3-2, AFM 40-1 (1953), the Commanding Office of Presque Isle, the serviced activity, issued a notice to that effect on March 27, 1953.

It should not go unobserved that when Presque Isle elected to become a separate competitive area, this election was within the authority delegated to the local authorities at Presque Isle. However, this local option only applied to a situation wherein the servicing and serviced authorities were under a different command jurisdiction, as was the situation vis a vis Loring and Presque Isle. Thus, in 1953, when Presque Isle did in fact elect to identify itself as a separate competitive area, this election rested solely on the fact that Presque Isle was under the command of ADC and that it was not necessary, in such a case, to seek and gain prior approval of Headquarters, U. S. Air Force (Headquarters). Had Presque Isle not been under a different command jurisdiction than Loring in 1953, it would have had no local authority to establish itself as a separate competitive area, but would have had to seek and gain prior approval from Headquarters. 2a(2) (1953). In this respect, the 1954 Regulations were substantially the same. 2a(2)(a), AF R3.2, AFM 40-1 (March 31, 1954).

In 1957, the Air Force Regulations were substantially altered with respect to the basic policy for the establishment of competitive areas. 2a(1), AF R3.2, AFM 40-1 (August 7, 1957) (hereinafter referred to as 2a),provided:

> "All activities in a commuting area which are serviced by a single central personnel civilian office wherever located, will constitute one competitive area, regardless of command jurisdiction." (Emphasis supplied.)

And 2b, AF R3.2, AFM 40-1 (August 7, 1957) (hereinafter referred to as 2b), provided in part:

> "If an exception to this plan is considered necessary, prior approval of Headquarters, USAF will be required." (Emphasis supplied).

Thus, the former Regulations by which Presque Isle was able to identify itself as a separate competitive area were changed in two notable respects: (1) the elimination of separate command jurisdiction

as a basis for the establishment of separate competitive areas, and (2) the removal from local activities of the election to be identified as a separate competitive area. In short, the 1957 Regulations had the effect of removing from Air Force installations the previously delegated right to establish separate competitive areas based solely on different command jurisdiction. Therefore, any exception to the plan for the establishment of competitive areas as set forth in 2a(1) or (2) would require approval of Headquarters, pursuant to the provisions of 2b.

In recognition of the fact, however, that exceptions to the basic plan of competitive areas, which exceptions were predicated upon previous Air Force Regulations, might still constitute valid and subsisting exceptions, the Air Force furnished instructions in Transmittal Sheet No. 119. Through the Transmittal Sheet the Air Force advised its installations that in those cases in which competitive areas had been established under the provisions of previous Regulations, but which do not conform to the basic plan of competitive areas as set forth in 2a of the 1957 Regulations, no change would be required. Since Presque Isle had elected under the previous Regulations, which permitted an exception based on separate command jurisdiction, to be identified as a separate command jurisdiction, and because it was in fact under a separate command jurisdiction in 1957, the exception under which its separate identity had been established was still a valid and subsisting exception. It was for this reason that Presque Isle was entitled to retain its separate identity at the time the 1957 Regulations were issued. But, this proviso in the Transmittal Sheet was not intended to be construed to permit the indefinite continuance of an exception to the basic competitive area plan after the basis for the exception ceased to exist.

In the instant case, the plaintiffs rely on 2c, AF R3.2, AFM 40-1 (August 7, 1957), (hereinafter referred to as 2c), which provides:

> "In any case where a separate competitive area is established for the best interests of the

> Air Force under the provisions of subparagraph 'b' above, later consolidation can be effected only when the following conditions are met:
>
> (1) Both the serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.
>
> (2) A reduction in force is not imminent in either activity at the time of the consolidation."

Because 2c is inapplicable to the facts in the instant case, the plaintiffs' reliance on this Regulation is misplaced.

It is clear that the application of 2c is limited by its own terms to "any case where a competitive area is established for the best interests of the Air Force under the provisions of subparagraph 'b'." Thus, if "a separate competitive area is established ... under the provisions of subparagraph 'b' ..., later consolidation can be effected only when the ... conditions [of (1) and (2) of 2c] are met." In other words, 2c only applies to a separate competitive area created pursuant to the provisions of 2b as an exception to the basic plan described in 2a. In applying this construction to the facts in the instant case, it is apparent that if 2c had any application at all in the plaintiffs' situation, it must first be established that prior approval had been sought and received from Air Force Headquarters pursuant to 2b for Presque Isle to continue as an exception to the basic plan after the basis for its separate status was removed in 1959. Approval to continue as a separate competitive area was not secured. 2d, AF R3.2, AFM 40-1 is also inapplicable, for this provision applies to "any competitive area which is established under 'b' or 'c' above."

The distinction Presque Isle enjoyed as a separate competitive area derived from a former Regulation which was superceded by the 1957 Regulations. But because of the instructions in Transmittal Sheet No. 119, no change was required in 1957 because Presque Isle's status as a separate competitive area was established under the

provisions of former Air Force Regulations; since the basis for that status constituted a valid and subsisting exception, Presque Isle was entitled to retain its separate identity at the time the 1957 Regulations were issued. But, Transmittal Sheet No. 119 did not permit the indefinite continuance of an exception to the basic plan after the basis for the exception ceased to exist.

In July 1959, when SAC acquired jurisdiction over Presque Isle, consolidation of the two former competitive areas of Presque Isle and of Loring was automatic by operation of the Regulations, both current and former. This consolidation simply terminated an exception to the basic policy because the basis for the exception ceased to exist and the continuation of such an exception could be permitted only by leave of Headquarters.

When notice of the decision to deactivate Presque Isle became known in early 1961, a question arose as to the status of Presque Isle because of the 1959 change in command jurisdiction. Air Force Headquarters, the ultimate authority, informed the local authorities in Maine that since the basis for separate competitive areas ceased to exist in 1959, a single competitive area automatically had existed from the date of transfer of command of Presque Isle to SAC in July, 1959. Although the local authorities in Maine erred in failing to comprehend the meaning of the 1957 Regulations and the Transmittal Sheet, this fact could not control the decision of Headquarters, nor was it binding upon the Civil Service Commission. And it cannot control here. Cf. Social Security Board v. Nierotleo, 327 U.S. 358, 369 (1946). It does not appear that Headquarters, the ultimate authority, was ever consulted before April 27, 1961. The fact that before that date the local authorities at Presque Isle and Loring misunderstood the Regulations was no reason for the Air Force to continue the erroneous application of them. When the error was brought to the attention of Headquarters, the situation was immediately clarified. An analogous situation was presented in Koshland v. Helvering, 298 U. S. 441 (1936). In that

case the Supreme Court nullified a regulation which had been uniformly accepted as law for 16 years even though the reasons for respecting long-standing regulations were present in their strongest combination -- the need for predictability, the widespread reliance on the customary practice and the harshness of upsetting retroactively the accepted law. None of these elements are present in the instant case.

Furthermore, these earlier interpretations by the authorities at Presque Isle and Loring "do not constitute ... a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." Skidmore v. Swift & Co. 323 U.S. 134, 139 (1944). Thus, when the local authorities in Maine misapplied the 1957 regulations, "its evaluation and inquiry were apparently restricted by its notion" of the meaning of the Regulations, an understanding of the Regulations which Headquarters, the ultimate authority, held to be erroneous. Skidmore v. Swift & Co., supra at 140.

With respect to the interpretation by Headquarters and the Commission, the language from Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939) is apropos here:

> "So long as there is warrant in the record for the judgment of the expert body it must stand ... the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body!".

See also in this connection, Federal Broadcasting System v. FCC, 99 U.S. App. D.C. 320, 239 F.2d 941 (1956) and American Airlines v. CAB, 97 U.S. App. D.C. 324, 231 F.2d 483 (1956).

In Bowles v. Seminole Rock Co. 325 U.S. 410 (1945), the Supreme Court was called upon to consider the proper interpretation and application of certain provisions of a regulation. At pp. 413-414, the Court stated that since a determination of this question:

> "Involved an interpretation of an administrative regulation, a Court must necessarily look to the

> administrative construction of the regulation if the meaning of the words used is in doubt ... But the ultimate criterion is the administrative interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."
> (Emphasis supplied.)

It is clear that the decision of the Air Force and its subsequent affirmation by the Civil Service Commission were not plainly erroneous or inconsistent with the regulations.

The plaintiffs state that it "is not the function of the Civil Service Commission to sit as a court of equity" but its duty is to apply the law as it is. The record discloses that the Regulation in question (2c) and the Transmittal Sheet issued therewith were not applicable to the instant case. The Commission also concluded that the Air Force action "was not unfair from an equitable point of view." Such a finding is not improper as the Commission had a responsibility and interest in dealing justly with all Air Force employees within the commuting area.

On the basis of this record, however, it is clear the Commission was exercising its discretion and judgment in order to achieve not only a legally sound result, but also, an equitable result. These plaintiffs would be hard put to argue seriously that the result reached by the Air Force and the Commission was not the fairest disposition of the case. In rendering their decision herein, both the Air Force and the Commission were "called upon to exercise its specialized, experienced judgment" and their "discretionary determination should not be overturned in the absence of a patent abuse of discretion." Moog Industries v. FTC, 355 U.S. 411, 413 (1958).

As the record discloses, Headquarters concluded that Presque Isle and Loring, in the absence of "prior approval," were automatically consolidated in 1959, by virtue of the removal of the basis for the exception to the basic plan. In Board v. Hearst Publications, 322 U.S. 111 (1944), the factual analysis by the NLRB was rejected by the appellate court. However, the Supreme Court stated at pp. 130-131:

"In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the board's, when the latter have support in the record ... Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. ... But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. ... the Board's determination [of fact] under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Similarly, in the instant case, "it is not the court's function to substitute its own inferences of fact for [either those of the Air Force or the Civil Service Commission], when the latter have support in the record."

Conclusion

Clearly, the provisions upon which the plaintiffs rely are inapplicable to the facts herein. For this reason, and in view of the foregoing points and authorities, it is respectfully submitted that the defendants' cross-motion for summary judgment should be granted.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Robert B. Norris
Assistant United States Attorney

[Filed November 7, 1962]

ORDER

Upon consideration of the plaintiffs' motion for summary judgment, the defendants' cross-motion for summary judgment, and argument of counsel in open Court, and it appearing to the Court that there exists no genuine issue of fact and that the defendants are entitled to judgment as a matter of law, it is by the Court this 6th day of November 1962

ORDERED that the plaintiffs' motion for summary judgment be and the same hereby is denied, and,

FURTHER ORDERED that the defendants' cross-motion for summary judgment be and the same hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice.

/s/ Leonard J. Walsh
United States District Judge

[Certificate of Service]

[Filed November 29, 1962]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs herein hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order denying the plaintiffs' Motion for Summary Judgment and the granting of the defendants' Cross-Motion for Summary Judgment and dismissing the complaint with prejudice entered in this action on November 7, 1962.

Dated: November 29, , 1962

/s/ JOHN J. SCHLICK
Attorney for Appellants

Alvord and Alvord
200 World Center Building
Washington 6, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17519

RALPH K. BAXTER, ET AL., APPELLANTS

v.

JOHN W. MACY, JR., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT B. NORRIS,
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

No. 17519

QUESTION PRESENTED

In the opinion of the appellees, the following question is presented:

Did the Air Force correctly rule that Presque Isle Air Base and the nearby Loring Air Base were in the same competitive area for purposes of the reduction in force necessitated by the deactivation of Presque Isle Air Base?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17519

RALPH K. BAXTER, ET AL., APPELLANTS

v.

JOHN W. MACY, JR., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants are thirty-four civilians who were separated by reduction in force from their positions with the United States Air Force at Loring Air Force Base, Loring, Maine (J.A. 5, 13). They filed suit for reinstatement in the District Court against the members of the Civil Service Commission and the Secretary of the Air Force, appellees here (J.A. 1–3). The District Court granted appellees' motion for summary judgment and this appeal followed (J.A. 65).

The challenged reduction in force by which appellants were separated from their positions at Loring Air Force Base took place in June 1961 (J.A. 5). It was necessitated by the closing, in the Spring of 1961, of Presque Isle Air Force Base, which is also in Maine and is nearby to Loring (J.A. 5, 12). Presque Isle and Loring were in the same commuting area, were under the same command jurisdiction, and were serviced by the same central personnel office (J.A. 12). Under the applicable regulation—Air Force Manual 40–1, Chapter AF R3.2 (August

7, 1957)—the two bases were thus determined by the Air Force to be in the same competitive area (J.A. 42–44, 53–54). Because Presque Isle and Loring were in the same competitive area those employees at Presque Isle who had higher retention preference standing than appellants were not discharged upon the elimination of their jobs at Presque Isle, but instead replaced appellants in the positions that appellants held at Loring (J.A. 5, 13). The 1st Civil Service Region and the Civil Service Commission's Board of Appeals and Review upheld appellants' separation by reduction in force (J.A. 5–19). As noted, appellants filed suit for reinstatement in the District Court, and that court granted appellees' motion for summary judgment (J.A. 1, 65).

SUMMARY OF ARGUMENT

The Air Force correctly and justly ruled that Presque Isle Air Base and the nearby Loring Air Base were in the same competitive area for purposes of the reduction in force necessitated by the deactivation of Presque Isle in 1961. Thus appellants, who were employed at Loring, were properly reached by the reduction in force. At the time of the deactivation of Presque Isle and the reduction in force there were no distinctions between the two bases which would have supported the establishment of the two bases as separate competitive areas under the regulations. They were under the same command, in the same commuting area, and serviced by the same central civilian personnel office. The single distinction between the two bases which had established them as separate competitive areas in 1953 had been eliminated two years before the reduction in force. The language and purpose of the regulations make it clear that upon the elimination of this distinction the two bases became a single competitive area.

ARGUMENT

The Air Force correctly ruled that Presque Isle Air Base and Loring Air Base were in the same competitive area

Appellants claim that they should have been unaffected by the reduction in force necessitated by the closing of Presque Isle Air Force Base. They do not dispute that they had lesser

retention rights than the employees of Presque Isle who replaced them. Nor do they dispute that Loring Air Force Base where they worked is geographically close to Presque Isle, or that Loring and Presque Isle were under the same command, serviced by the same central personnel office, and in the same commuting area. Rather they maintain that the regulations must be interpreted in such a way as to have put Loring outside Presque Isle's competitive area, so that only Presque Isle employees should have been reached by the reduction in force when Presque Isle was closed. But the relevant history of the two bases and the applicable regulations show that the Air Force acted correctly in ruling that Loring and Presque Isle were in the same competitive area and thus that Loring employees were subject to the reduction in force.

In 1953 Presque Isle Air Force Base was under the jurisdiction of the Air Defense Command. The nearby Loring Air Force Base was under the jurisdiction of the Strategic Air Command. Both bases were within the same commuting area and were serviced by the same central civilian personnel office, as they were 8 years later when the challenged reduction in force took place (J.A. 5, 12). Because the two bases in 1953 were under different command jurisdictions, the commanding officer of Presque Isle had the option, under the applicable regulation then in effect, of designating Presque Isle as a separate competitive area for reduction in force purposes.[1] The commanding officer of Presque Isle exercised the option granted him by the regulation, and issued an order designating Presque Isle as a separate competitive area on March 27, 1953

[1] Air Force Manual 40–1, Chapter AF R3.2, para. 2a(1)(b), in force in 1953, provided:

"All activities which are in the same local commuting area and are serviced by a single central civilian personnel office, which also is located within the same commuting area, will be considered as part of the same competitive area as the servicing installation, unless a serviced activity, which is under a different command jurisdiction than the servicing installation, decides that the best interests of the Air Force require that a separate competitive area be established for that activity." (J.A. 33, Exhibit B.)

In 1954 the applicable regulation was amended, but remained substantially the same with respect to the right of a local authority to establish a separate competitive area when under a separate command jurisdiction. (Air Force Manual 40–1, Chapter AF R3.2, para. 2a(2)(a), 31 March 1954) (J.A. 37).

(J.A. 12–3). To do this the commanding officer was not required to seek approval from Air Force Headquarters, and he did not seek such approval. Had Presque Isle not been under a different command jurisdiction than Loring in 1953, it would have had no local authority to establish itself as a separate competitive area, but would have had to seek and gain prior approval from Headquarters (J.A. 34).

In 1957 a new regulation was issued by the Air Force which substantially altered the basic policy for the establishment of competitive areas. This regulation, Air Force Manual 40–1, Chapter AF R3.2, para. 2, 7 August 1957, provides in pertinent part:

> 2. COMPETITIVE AREAS
>
> a. FPM Chapter R3 prescribes the criteria for establishing competitive areas and the requirements for recording them. In conformity with these criteria, competitive areas in the Air Force will be established in accordance with the following plan.
>
> (1) All activities in a commuting area which are serviced by a single central civilian personnel office, wherever located, will constitute one competitive area regardless of command jurisdiction. * * *
>
> b. If an exception to this plan is considered necessary, prior approval of Headquarters USAF will be required. * * *
>
> c. In any case where a separate competitive area is established for the best interests of the Air Force under the provisions of sub-paragraph "b" above, later consolidation can be effected only when the following conditions are met:
>
> (1) The serviced and servicing activities must agree that the consolidation will be in the best interest of the Air Force.
>
> (2) A reduction in force is not imminent in either activity at the time of consolidation. * * * (J.A. 6–8, 43–44).

Thus the former regulation by which Presque Isle was able to identify itself as a separate competitive area was changed in two significant respects: (1) separate command jurisdiction was eliminated as a basis for the establishment of separate competitive areas, and (2) local activities no longer had an option to identify themselves as separate competitive areas when under separate command jurisdiction, or in any other circumstances. In short, the 1957 regulation had the effect of removing from Air Force installations the previously delegated right, which Presque Isle had exercised, to establish separate competitive areas based solely on different command jurisdiction. Therefore, any exception to the plan for the establishment of competitive areas as set forth in para. 2a of the new regulation would require approval of Headquarters, pursuant to the provisions of para. 2b of that regulation.

In recognition of the fact that variations from the competitive areas plan established by the 1957 regulation, which variations were based on previous regulations, might still retain validity, the Air Force issued instructions with the 1957 regulation in Transmittal Sheet 119.[2] The transmittal sheet advised Air Force installations that where competitive areas which did not conform with the plan in the 1957 regulation had been established under the provisions of previous regulations, no change would be required. Since Presque Isle had elected, under the previous regulations permitting an exception

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[2] Transmittal Sheet 119 provides in pertinent part:

"Any administrative plans or systems currently in effect, which were established under former regulations or by approval of this Headquarters, will be resubmitted if it is desired to continue them. An exception is made in the case of competitive areas, which is covered below.

"A basic pattern has been established for competitive areas which provides that all activities in a commuting area, serviced by the same Central Civilian Personnel Office, regardless of physical location or command jurisdiction, will be in the same competitive area. Where competitive areas have been established under the provisions of the former Chapter AF R3, which do not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices. The record also will include the regulatory or other authority, and date, which permitted establishment of the competitive areas concerned. Activities desiring to change from atypical competitive areas to the basic pattern established by this regulation will be governed by the provisions of paragraph 2c, section 2, of this chapter." (J.A. 45–46, Exhibit E.)

based on separate command jurisdiction, to be identified as a separate competitive area, and because Presque Isle was in fact still under a separate command jurisdiction in 1957, the exception under which its separate identity had been established was still a valid and subsisting exception. Therefore, under the instructions furnished in the transmittal sheet Presque Isle was entitled to retain its separate indentity at the time the revised regulation was issued in 1957.

In 1959 Presque Isle's mission changed. Therefore Presque Isle, which had been under the command jurisdiction of the Air Defense Command, was placed under the command jurisdiction of the Strategic Air Command, which also had jurisdiction over Loring (J.A. 10, 12–13). Thus the distinction between Loring and Presque Isle—separate command jurisdiction—upon which was based the establishment in 1953 of Presque Isle as a competitive area separate from Loring, was eliminated. The condition which had enabled Presque Isle to retain its status as a separate competitive area without the approval of Headquarters required by para. 2b of the 1957 regulation ceased to exist.

When the decision to deactivate Presque Isle became known in early 1961, a question arose as to the status of Presque Isle because of the 1959 change in command jurisdiction. Air Force Headquarters, the ultimate authority, informed the local authorities in Maine that since the basis for separate competitive areas ceased to exist in 1959, a single competitive area consisting of Loring and Presque Isle had existed from the date of transfer of command of Presque Isle to the Strategic Air Command in 1959. From this it followed that Loring personnel would be subject to the reduction in force upon deactivation of Presque Isle. The communication from Headquarters to the local authorities, dated May 1, 1961, stated:

> Separate competitive areas for Presque Isle and Loring AFBs were based on provisions in 1954 edition of R3 [see n. 1, *supra*] allowing separate competitive areas as exception to normal pattern when serviced installation under different command jurisdiction than servicing installation. At time separate competitive areas established, Presque Isle was under ADC juris-

diction. That was only basis for exception. If both installations had been under SAC, a single competitive area would have been required by 1954 regulations just as under current regulations. Action of first CS Region in upholding separate competitive areas cited separate command jurisdictions as basis. Review by survey team also prior to transfer to SAC. When Presque Isle became SAC installation, basis for separate competitive areas ceased to exist and single competitive [area] automatically existed from date of transfer of command jurisdiction to SAC. This would also have been case if 1954 regulations had not been changed by TS 119. Basic policy in 1954 and current R3 is same. Both provide single competitive area for all activities in commuting area serviced by same CCPO. Difference is only that 1954 regulation allowed local exception where activities under different command jurisdiction, while current R3 requires Hq USAF approval for this or any other exception to normal pattern. TS 119 withdrew this local authority for exception to standard pattern. On assumption that only exceptions in effect were those permitted by superseded regulation, TS 119 did not require such exception be submitted Hq USAF for approval. Applied to Presque Isle and Loring situation, this provision permitted continued use of previous exception clause for separate competitive areas based on separate command jurisdictions. This provision in TS 119 cannot be construed to permit indefinite continuance of an exception after basis for exception ceases to exist. Para 2c, Sec 2, Chap R3 not applicable where separate competitive areas automatically revert to standard pattern of single area because basis for exception ceases to exist. Change occurred in 1959 and is not proximate to RIF imminent 1961. Your request for separate competitive areas for Presque Isle and Loring AFBs cannot be approved. RIF resulting from closure Presque Isle must be conducted on basis AF is single employer in

the commuting area that includes these two installations (J.A. 53–54).

This ruling by the Air Force was proper, as the authorities in the Civil Service Commission and the District Court found. The Air Force correctly held that the 1957 regulation [p. 4, *supra*] and Transmittal Sheet 119 [n. 2, *supra*] which accompanied it could not be construed to permit the indefinite continuance of Presque Isle as a separate competitive area after the basis for the exception which allowed Presque Isle to become a separate competitive area—the difference in command jurisdiction—ceased to exist in 1959. The contrary ruling which appellants say should have been adopted would have been inconsistent with the pre-1957 regulations [n. 1, *supra*] under which Presque Isle became a separate competitive area, which provided that local authority to establish separate competitive areas depended on the existence of separate command jurisdiction. Such a ruling would also have violated the spirit and letter of the 1957 regulation. That regulation took a less favorable view of separate command jurisdiction as a basis for separate competitive areas than did the pre-1957 regulations, by stating that activities in a commuting area serviced by a single central civilian personnel office will constitute one competitive area regardless of command jurisdiction, and by providing that exceptions could not be made locally but had to have Headquarters approval. The pre-1957 regulations make it clear that if Presque Isle and Loring had come under the same command jurisdiction while those regulations were in effect they would have automatically become one competitive area. The essence of those regulations was that a local authority could maintain itself as a separate competitive area only so long as it was under a separate command jurisdiction. And it cannot be said that Transmittal Sheet 119, which accompanied the 1957 regulation, reverses that policy. Indeed, since the 1957 regulation looks with less favor on separate command jurisdiction as a basis for separate competitive areas than did the pre-1957 regulations, it is unreasonable to contend, as do appellants, that the transmittal sheet, an adjunct of the 1957 regulation, must be interpreted to preserve the separation of a competitive area which is based upon a separate command

jurisdiction that becomes defunct where the pre-1957 regulations would not have so preserved it.

Examination of the transmittal sheet shows that it does not, as appellants would have it, contradict the policy and purpose of the regulation it is meant to implement. By making atypical competitive areas established under pre-1957 regulations "a matter of permanent record" the transmittal sheet did not in any sense purport to prevent future changes in those areas when circumstances warranted change. The quoted phrase is much more subject to the reasonable interpretation which the Air Force ruling and the history of the regulations give to it than to the rigid interpretation urged by appellants. It need not at all be read to provide appellants with immunity against the fundamental change in Presque Isle's status which occurred when Presque Isle came under the same command jurisdiction as Loring.

Appellants' reliance on subparagraph 2(c) of the 1957 regulation is misplaced. That subparagraph puts limitations on consolidation where separate competitive areas are "established * * * under the provisions of subparagraph 2b" of the 1957 regulation. 2(b) provides for establishment of separate areas with the prior approval of Headquarters. In the present case the local authority established the separate competitive area under the pre-1957 regulations without ever obtaining the approval of Headquarters under the old regulations (J.A. 34, 38) or under the 1957 regulation (J.A. 43). Since Presque Isle was not established as a separate competitive area under the provisions of 2(b), the later consolidation of Presque Isle and Loring as one competitive area could under no circumstances have been subject to the provisions of 2(c). Furthermore, the sentence in Transmittal Letter 119 which refers to 2(c) makes that subparagraph applicable—assuming prior approval of Headquarters of the separate competitive area, and even assuming prior approval of Headquarters for the separate competitive area does not have to be shown—only where *activities desire* to change from the separate or atypical competitive area established when the previous regulations were in force. Here the change from the atypical separate area was effected automatically, when the basis for the separate area was

eliminated. It was not effected on the desire or initiative of the local authorities involved.[3] Thus Transmittal Letter 119 did not make 2(c) applicable to the automatic consolidation of Presque Isle and Loring into one competitive area in the present case, any more than it forbade their automatic consolidation upon the elimination of the condition upon which the establishment of Presque Isle as a separate competitive area was based.[4]

It is not disputed that Loring and Presque Isle are under the same command jurisdiction, are serviced by the same central personnel office, and are geographically close to each other and within the same commuting area. Thus there exist no distinctions between Loring and Presque Isle by which they could be designated as separate competitive areas under the old or the new regulations. Yet appellants urge upon this Court a narrow, superficial and inaccurate reading of the transmittal sheet which accompanied the new regulations in order to controvert the policy of both the old and the new regulations and maintain an anachronistic separation of competitive areas. The Air Force, the Civil Service Commission, and the District Court properly refused to accept that reading, which, contrary to appellants' view, is not at all required by the words of the transmittal sheet. The Air Force's interpretation of the transmittal sheet and the regulations was a just[5] and reason-

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[3] It should be noted that when local activities desire to rescind an atypical competitive area which was approved by Headquarters and the basis for which still exists, the uses of the protections of 2(c) are apparent. Such is not the case where the basis for the atypical competitive area ceases to exist and reversion to the basic pattern is automatic.

[4] After 1959 local authorities on occasion treated Presque Isle as a separate competititve area in reductions in force of less magnitude than the instant one (J.A. 13, 19). Appellants rightly make nothing of this in their argument (Br. 4–8), since erroneous action by local authorities could not preclude correct interpretation of the regulation by the ultimate authority, Air Force Headquarters.

[5] The decision of the 1st Civil Service Region stated:

"As to the merits of the action of Headquarters in having a single competitive area for the instant reduction in force, we are of the opinion that consideration must be given to the fact that the Presque Isle Base, which is the older of the two, was not merely to have a partial reduction in its total complement, but was to be deactivated. If it were a separate competitive area, long time career employees, many with veteran's preference and with the highest retention preference standing at Presque Isle would

able one. An agency's interpretations of its own regulations are to be accorded great weight. "[A] Court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt * * * [T]he ultimate criterion is the administrative interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413–414 (1945). In rendering their decision in the instant case both the Air Force and the Commission were "called upon to exercise [their] specialized, experienced judgment" and their "discretionary determination should not be overturned in the absence of a patent abuse of discretion." *Moog Industries* v. *FTC*, 355 U.S. 411, 413, 414 (1958); *Morgan* v. *Udall*, 113 U.S. App. D.C. 192, 306 F. 2d 799 (1962); *Johnson* v. *Britton*, 110 U.S. App. D.C. 164, 168, 290 F. 2d 355, 359 (1961); *Wagner* v. *Higley*, 98 U.S. App. D.C. 291, 235 F. 2d 518 (1956), *cert. denied*, 352 U.S. 936.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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face separation while, close by, at a newer Air Force Base under the same command jurisdiction, lower retention preference standing employees would remain untouched and unaffected although they lacked the career tenure or the veteran's preference or the length of service of their fellow Air Force, Strategic Air Command employees at Presque Isle. We think that Headquarters, U.S. Air Force was justified in avoiding such a result, and that it had the necessary authority to do so within the framework of its own Regulations, Chapter R3 Section 2." (J.A. 19.)

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REPLY BRIEF FOR APPELLANTS

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RALPH K. BAXTER, ET AL.,

Appellants.

v.

JOHN W. MACY, JR., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Appellees state on page 11 of their brief that "[A] Court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt * * * " citing, Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945). The words used in the applicable regulation are not in doubt. On the contrary they are quite clear. At the time of the issuance of Regulation AFM 40.1 AFR 3.2 on August 7, 1957 (J.A. 42), the Air Force also issued Transmittal Sheet No. 119 (J.A. 45) explaining the meaning of the regulation. In the explanation it is made quite clear that where established competitive areas "do

not conform to the requirements of the new regulation, no change will be required. However, the plan in effect will be made a matter of permanent record in all affected civilian personnel offices." The Air Force now attempts to interpret the regulation in such a way that it does violence to the wording of both the Regulation and Transmittal Sheet. There is nothing in the wording of either document that can be construed to provide for automatic consolidation.

Appellees contend that the decisions of administrative agencies are based upon specialized and experienced judgments and "should not be overturned in the absence of a patent abuse of discretion." While the decisions of such agencies are entitled to some weight, they are not controlling and must be overruled when "plainly erroneous or inconsistent * * *." Johnson v. Britton, 290 F. (2d) 355; Morgan v. Udall, 306 F. (2d) 799. In this case the decision of the Air Force is clearly inconsistent with the Regulation and Transmittal Sheet.

On page 6 of Appellees' brief the following statement appears: "The condition which had enabled Presque Isle to retain its status as a separate competitive area without the approval of Headquarters required by para. 2b of the 1957 regulations ceased to exist." Again on page 9, they take the position that prior approval was never obtained. The Transmittal Sheet says any plans or systems in effect have to be resubmitted for approval whether or not they were established by former regulations or prior approval. Then it excepts all of the plans in the case of competitive areas and makes them permanent plans. (J.A. 45, paras. 3-4)

In footnote 4, page 10, of their brief, Appellees admit that "reductions in force of less magnitude" were carried out after 1959 up to and including February, 1961. This they say was the action of "local authorities." There is nothing in the record to indicate such action was on a decision of local authorities. It has always been admitted that reductions in force have been carried out to February, 1961 (J.A. 13)

presumably with Air Force knowledge. Furthermore, the rules should not change with the magnitude of the reduction in force.

The Appellees take the position (pp. 9, 10) that under Transmittal Sheet 119, Section 2(c) was only applicable to the activities and not Headquarters. The law is well settled that the Air Force is bound by its own regulations.

In Service v. Dulles, 354 U.S. 363, at 372, 1 L. Ed. 2d 1403, 1410, 77 S. Ct. 1152, the Court states:

> " * * * Second, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in United States ex rel. Accardi v. Shaughnessy, 347 US 260, 98 L ed 681, 74 S Ct. 499, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. * * * Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first."

In footnote 5, pp. 10-11, of their brief, the Appellees quote from the decision of the 1st Civil Service Region "As to the merits of the action of Headquarters on having a single competitive area for the instant reduction in force * * *."

As the Court further stated in the Service case, supra, page 373:

> " * * * We do not understand the respondents to dispute that the principle of the United States ex rel. Accardi v. Shaughnessy (US) supra, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment." (Emphasis supplied)

Respectfully submitted,

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